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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

FRANK LOCASCIO,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The Second Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED FOR REVIEW

I. MAY A JURY BE GIVEN AN INSTRUCTION, UNPRECEDENTED IN A FEDERAL CONSPIRACY PROSECUTION, THAT A DEFENDANT'S "PRESENCE ITSELF" DURING A CONVERSATION ABOUT CRIMES IS ADEQUATE TO "DEMONSTRATE" HIS GUILT IF HIS PRESENCE "IS A FUNCTIONAL PART" OF AN ALLEGED CONSPIRACY TO COMMIT THOSE CRIMES?

II. DOES A DEFENDANT'S "PRESENCE ITSELF" AT AN ORGANIZATIONAL MEETING AS AN ADVISOR RENDER HIM LIABLE ON A CONSPIRACY THEORY FOR ALL CRIMES DISCUSSED AT THAT MEETING, ABSENT EVIDENCE BEYOND A REASONABLE DOUBT OF HIS INTENT TO COMMIT THOSE CRIMES?

III. DOES THE USE OF A "FUNCTIONAL PRESENCE" THEORY IN A RICO PROSECUTION RENDER THAT STATUTE UNCONSTITUTIONAL AS APPLIED?

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COURT OF APPEALS OPINION

The opinion of the Second Circuit Court of Appeals in this matter is reported at 6 F.3d 924 (2d.Cir 1993).

STATEMENT OF JURISDICTION

On April 2, 1992, petitioner and a co-defendant, John Gotti, were convicted of offenses purportedly arising from their participation in the "Gambino Family," an alleged RICO enterprise. Petitioner was sentenced to life without parole on June 23, 1992. A timely notice of appeal was filed June 30, 1992. The Second Circuit Court of Appeals had jurisdiction to consider the appeal under 28 U.S.C. § 1291. That court filed its opinion affirming petitioner's convictions on October 8, 1993, denying a timely petition for rehearing on December 7, 1993. This Court has jurisdiction to review

the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).[1]

STATEMENT OF THE CASE

A. Introduction

The Second Circuit's approval in the opinion below of the government's theory and instructions on conspiratorial liability constitutes a sharp break with traditional notions of criminal complicity, which insist on individual rather than collective responsibility. The Circuit sanctioned an instruction, unprecedented in a federal conspiracy prosecution, injecting the confusing and undefined concept of "functional presence" into the jurisprudence of conspiratorial liability; it declared "presence itself" at meetings where crimes are discussed to be an adequate substitute for a defendant's intent and agreement to commit those crimes; and it permitted membership and status in an organization to serve as the basis for a RICO conviction, in violation of congressionally declared limits on RICO liability. By doing so, it rendered the RICO statute unconstitutional as applied in this case.

The Court of Appeals decision having plainly departed from "applicable decisions of this Court," and having come into conflict with other "United States court of appeals on the same matter," review on certiorari is warranted.

The United States convicted petitioner LoCascio of the gravest of offenses, including murder and conspiracy to murder, without proof that he did anything other than *appear* during conversations in which some of these crimes were discussed, on the basis of a conspiracy instruction never before given in federal court. The government's theory as to each crime for which petitioner has been held

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[1] The District Court for the Eastern District of New York proceeded pursuant to its jurisdiction under 18 U.S.C. § 3231.

accountable was that as the alleged underboss of the "Gambino Family," LoCascio was vicariously liable for any misdeed committed by members of that group which had been discussed in his presence, and some that had not.

The novel instruction legitimized the government's sweeping contention of collective responsibility by permitting conspiratorial liability to rest on the "function" served by a party's presence, rather than on the key elements of agreement and intent.[2] The instruction sanctioned the subsequent use by the government of the startling proposition at the center of the prosecution's closing argument: that LoCascio's presence at meetings with others rendered him guilty of their crimes "*wholly apart from what he says or does.*" (RT 7825) (emphasis added). The Court of Appeal then held that the jury was permitted to convict petitioner on a showing of no more than that it was "likely" that LoCascio's presence signified his participation in the charged crimes.

Organizational status and membership alone cannot substitute for *proof beyond a reasonable doubt* of intent to participate in specific offenses apparently committed by other members of that group. Constitutional, statutory, and common law precedents have consistently rejected such a concept of guilt by association.

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[2] In addition to conventional instructions on conspiratorial liability, the district court's charge included the following unprecedented elements:

> The defendant's presence may establish his membership in a conspiracy, if all the circumstances considered together show that his presence was meant to advance the goals of the conspiracy.
>
> * * *
>
> In other words, presence itself may demonstrate membership in a conspiracy only if that presence is a functional part of the conspiracy.

(RT 8058-8059).

Nor may presence at the discussion of an offense, even presence that serves a "function," constitute proof adequate as a matter of law to convict of conspiracy to commit that offense, as the jury was instructed at petitioner's trial. The law does not deem an action that objectively furthers a criminal plan an adequate replacement for the subjective mental state elements of agreement and intent that have long been viewed as indispensable elements of the crime of conspiracy.

The implications of *LoCascio*'s expansion of conspiratorial liability are profound, particularly because they come in a RICO prosecution. No citizen, not even an alleged "mobster," should be convicted of conspiracy absent an adequate showing of agreement and intent to commit a specific charged offense. Moreover, as with other RICO-related precedents, the holding in this case will soon migrate beyond the context of "organized crime" prosecutions. Leaders of anti-abortion organizations may propose trespassing, and even arson, as a protest tactic; presidents of corporations may urge breaches of environmental regulations to their boards of directors; a member of a sect's leadership may propose a bombing in a meeting with close advisers; a head of a law firm may suggest to his executive committee destroying documents under government subpoena; a broker may recommend insider trading to members of his management committee. Under *LoCascio*, all those present when such proposals are advanced at private meetings are *by that fact responsible for them*, if it is proven they are advisors to the proponent of the illegality. The fact that they had no notice beforehand that a specific legal violation was to be proposed, and refused to assent to it, or even actively disagreed with it when advanced, does not negate their conspiratorial liability as that notion is defined by *LoCascio*. Decisions of other circuits as to the proper scope of civil and criminal conspiracy principles are to the contrary.

This Court long ago held that it would view with suspicion attempts by the government to broaden the kind of derivative criminal liability at issue in this case. *See Grunewald v. United States*, 353 U.S. 391, 404 (1957) ("Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."); *United States v. Krulewitch*, 336 U.S. 440, 450 (1949) (Jackson, J., concurring) ("[E]ven when appropriately invoked, the looseness and pliability of the [conspiracy] doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case."). The Second Circuit's decision in this case is precisely such an attempt to broaden traditional notions of complicity to "meet the exigencies of a particular case." This Court should grant the petition for certiorari to consider whether such an extension is advisable.

B. The Government's Theory And Evidence.

LoCascio was charged with John Gotti, and Salvatore "Sammy" Gravano with violating the Racketeer Influenced and Corrupt Organization statute ["RICO"], 18 U.S.C. § 1962(c), and related offenses.[3] The alleged enterprise was the Gambino family, of which Gotti was alleged to be the "boss," LoCascio the "acting underboss," and Gravano the "consigliere." The government's evidence against LoCascio consisted almost entirely of tapes of surreptitiously monitored conversations at the Ravenite Social Club and an

[3] In addition to the RICO charge, LoCascio was charged with and convicted of conspiracy to violate RICO, conspiring to commit murder and murder itself, of conducting gambling operations in New York and Connecticut, of loan sharking, of obstruction of justice, and of tax conspiracy. As noted, the government's theory as to each count was not that LoCascio himself committed any substantive offense, but rather that he was liable as a coconspirator for crimes committed by members of the Gambino family.

apartment above the club, on which tapes LoCascio's voice rarely appeared.[4] That evidence was augmented by the testimony of Salvatore "Sammy" Gravano, originally indicted with LoCascio, who became the government's principal witness in exchange for a remarkably lenient sentence on, *inter alia*, nineteen convictions of murder.

According to Gravano, he, Gotti, and LoCascio were members of the Gambino family administration. Gravano testified that Gotti became the "boss" of the Gambino family in 1986. In November of 1991, besides Gotti as boss, Gravano was the "underboss," and Frank LoCascio was acting "consigliere." The government also offered taped conversations of a discussion between Gotti and LoCascio in late 1989 in which Gotti referred to LoCascio as his "acting underboss" or "underboss."

The underboss of the Gambino family, as Gravano described the position when he held it, did not participate in, supervise, or approve of all of the criminal activities allegedly committed by family members, be they captains or soldiers, nor did the underboss share in the profits of all such activities. Gravano never testified that the decision-making of the family was collective, with the consigliere and underboss participating in or advising the boss on all decisions as to family businesses or activities, nor did he testify that

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[4] Since, as the government conceded at trial, Locascio "doesn't speak much on the tapes" (RT 7354), the question arose whether Locascio was present for the entirety of conversations during which he spoke only once or twice. The F.B.I. "expert" witness, George Gabriel, who testified as to how the tapes and transcripts were compiled, stated that if he heard a party during a conversation, he *assumed* the party was present for the entire conversation (sometimes hours long), provided only that the agent did not hear a door close, although he conceded that the party could well be in a different room of the apartment than the one in which the conversations were monitored. (RT 1857-60).

the assent of the underboss or consigliere was required for any, much less all, such decisions.

Gravano described his own responsibilities to be running the construction industry and "help[ing] John run the family." Gravano spoke with "some of the captains and took care of some of the problems in the Family." Gravano reemphasized that he spoke only to some of the captains about "their criminal activity."

Beyond this evidence concerning LoCascio's alleged membership and status in the Gambino family, the *LoCascio* panel found no evidence in the record that petitioner did or said anything to indicate his intention or agreement to commit the crimes of which he was accused. The entirety of the Second Circuit's description of the evidence against LoCascio follows:

> The government established at trial that Locascio's function as underboss was to advise Gotti in the formulation of plans for the Gambino Family's criminal activities. His conviction was principally grounded on his presence in the Ravenite Apartment during discussions about the crimes for which he was convicted, even though he did not personally discuss many of these crimes. The government's theory was that only the involved members of the conspiracy would have been allowed to attend these Ravenite Apartment meetings. Moreover, the government argued that LoCascio's role as an advisor mandated that he not speak up at such meetings, unless it was to assist Gotti.

6 F.3d at 943-44.

> [A]s the underboss, Locascio was present to help evaluate plans presented to Gotti and give advice as needed. Gotti, Locascio, and Gravano took extensive but ultimately unsuccessful precautions to ensure that their conversations in the Ravenite Apartment, the

> conversations constituting the bulk of the evidence against them, were not overheard. Considering the precautions taken to ensure security, and after hearing the tapes of what was discussed in the apartment, the jury was entitled to consider whether it was *likely* that Locascio would have been present during those conversations if he were not a participant.

Id. at 945 (emphasis added).

The evidence relied on by the panel arguably proved Locascio's *membership and status in a group*, which Congress explicitly refused to make a crime. There was no evidence, however, and the Circuit cited none, that petitioner intended to commit or actually committed those offenses of others that had been discussed in his presence; as to several offenses with which LoCascio was charged and convicted, there was no evidence that he had as much as attended a discussion of their commission.

For example, as to charges of conspiracy to murder Louis DiBono and the DiBono murder itself, there was no evidence that petitioner either participated in these offenses or assented to their commission. According to Gravano, Gravano himself wanted DiBono killed for reasons arising from their joint business ventures, and Gotti agreed because DiBono failed to keep appointments with him. The government's case against LoCascio rested on nothing more than a comment during a conversation with Gotti ten months before DiBono's death.[5] When Gotti, whose temper was described at trial as volatile, said he was going to "whack" DiBono, LoCascio "predict[ed]" that DiBono would show

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[5] It was the government's position in closing that "this conversation *alone* convicts these defendants" of the DiBono charges (RT 7431), although the conversation contained no statement by Locascio of any intent or agreement on his part that DiBono be killed. A defense objection to that argument was overruled.

up with "fifty" at a meeting the next day. Months after the Gotti-LoCascio conversation and long before his death, DiBono met with Gotti without incident.

Similarly, LoCascio was convicted of conspiracy to murder Corky Vastola based on tape recordings of discussions in which a plan to "whack" Vastola was discussed but eventually abandoned: no murder of Vastola was ever attempted. LoCascio said almost nothing during the conversations concerning Vastola, forcing the government at trial to take the

> position, legally, that Frank LoCascio's presence, served the purpose and that he need not utter one word at all to be part of the conspiracy. . . .

(RT 6910).

LoCascio was convicted of a conspiracy to have Gotti evade taxes based on a single conversation during which, according to the government's own expert, petitioner gave no direction or advice, legal or illegal, to Gotti regarding the latter's taxes. LoCascio's loan sharking conviction rested on one conversation in which Gotti referred to a three million dollar "book" held by one Joe "Butch" Carrao. LoCascio said nothing, nor was any evidence introduced that LoCascio participated in or benefitted from any extensions of credit, much less ones collected by extortionate threats of violence. Similarly, LoCascio neither said nor did anything to obstruct justice, merely being present at a conversation where Gotti referred to a paid "source" of confidential information.

Finally, as to the charge that LoCascio was guilty of conducting gambling operations in New York and Connecticut, the government introduced no evidence that LoCascio ever participated in, or benefitted from, any such gambling operations, *nor even that he was present at a discussion of such operations.* Rather, the government was left to defend these convictions on appeal with the startling argument that

the jury could infer that gambling *might* have been discussed by LoCascio during conversations as to the content of which no evidence was offered.

REASONS FOR GRANTING THE WRIT

I. IN SANCTIONING AN INSTRUCTION UNPRECEDENTED IN A FEDERAL CONSPIRACY PROSECUTION, THE SECOND CIRCUIT INJECTED THE CONFUSING AND UNDEFINED CONCEPT OF "FUNCTIONAL PRESENCE" INTO THE JURISPRUDENCE OF CONSPIRATORIAL LIABILITY

As noted above, after giving accepted definitions of conspiratorial liability to the jury, the district court used the phrase "in other words," thereby signaling the jury that they were about to receive an equivalent and alternative formulation of such liability. That formulation was that "presence itself" could prove membership in a conspiracy "if that presence is a functional part of the conspiracy."

This reference to presence as a "functional part of the conspiracy" appears to be based upon *United States v. Soto*, 716 F.2d 989, 992 (2d Cir. 1983), where the court in citing *United States v. Cirillo*, 499 F.2d 872 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974), placed in a parenthetical the sentence, "presence itself will support a conspiracy conviction only if that presence is a functional part of the conspiracy." *Soto* reversed the drug conspiracy conviction of a woman found asleep in a drug "cutting mill," a room containing narcotics and weapons. The woman had lived there for at least a month. The Second Circuit stated: "We believe that on the basis of association alone, the jurors let their imaginations run rampant." 716 F.2d at 993.

The *Cirillo* opinion does not mention the concept of "functional part." Rather, it simply reverses the convictions

of two alleged drug dealers based on a traditional "mere presence" analysis. 499 F.2d at 883. Thus, the "functional presence" language embodied in the instruction has no basis in the holdings of the Second (or any other) Circuit.

Nor is there any other basis for the trial court's novel formulation. The language does not appear in the pattern jury instructions found in Devitt & Blackmar's *Federal Jury Practice and Instructions.*[6] Nor do the instructions for any of the five Circuits that have such charges refer to presence as a "functional" part of a conspiracy.

A trial judge should not write jury instructions by simply borrowing and incorporating lines from appellate decisions particularly when the borrowing distorts the borrowed language:

> Appellate court opinions are written for a purpose different from that for which jury instructions are designed. It is the legal principle, not the words expressing it, which is pertinent and which will be helpful to the jury. . . . The use of legal terminology and instruction should be avoided. The lawyer and the judge preparing instructions should remember that the task is to shed light, and not add to the darkness.

Devitt, Blackmar & O'Malley, *Federal Jury Practice and Instructions*, § 8.02.

The familiar "mere presence" instruction, untainted by the unprecedented idea of "functional presence," has

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[6] *See* Devitt, Blackmar & O'Malley, *Federal Jury Practice and Instructions* § 28.05 (4th Ed. 1990):

> Merely associating with others and discussing common goals, mere similarity of conduct between or among such persons, merely being present at the place where a crime takes place or is discussed, or even knowing about criminal conduct does not, in itself, make someone a member of a conspiracy or a conspirator.

evolved as the most appropriate way to convey the government's burden to the jury. The pattern instruction does so in a precisely gauged manner, emphasizing that "mere presence" is not enough to convict, while at the same time conveying to the jury the notion that presence may be used for a extremely limited purpose: as some evidence of agreement. The pattern instruction, unlike the *LoCascio* court's formulation, teaches that presence cannot replace the requirement of an intent to commit the specific offenses charged as the objects of the conspiracy.[7] On the other hand, the "functional part" language of *Soto*, never intended to serve as an element of a jury instruction, is vague and confusing when used as such.

The new jury instruction validated by the *LoCascio* court constitutes a statement of law that can be applied to contexts wholly different than the present case. By holding that "functional presence" is sufficient to support a conspiracy conviction, the court has swept within the ambit of that crime's definition those who may serve a function in a conspiracy, although they have neither knowledge of or an intent to further the scheme. For example, the new "functional presence" instruction would permit a jury to convict a watchman hired to guard a warehouse filled with contraband upon a finding that his presence was intended to and did further the plot involving the contraband, absent any finding

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[7] The danger of upsetting the scales in favor of the government is palpable. *See* Developments in the Law: Criminal Conspiracy, 72 *Harv. L. Rev.*, 920, 933 (1959) (noting courts' "unfortunate tendency to overemphasize a rule of evidence at the expense of a rule of law" which tends to weaken the agreement requirement). The Second Circuit had itself previously noted that where willful membership in a conspiracy is a crucial element of the government's case, the trial judge has an obligation to make certain that any misunderstandings are cleared up with "concrete accuracy." *United States v. Velez*, 652 F.2d 258, 262 (2d. Cir 1981) (reversing a conviction where judge in supplemental charge refused to reinstruct that willful membership is an "essential" element).

that *the watchman* intended to participate and further the plot or even that he knew the contents of the warehouse. Likewise, one attending a meeting as an advisor could be found guilty of a crime discussed therein if he silently withheld his assent or even vehemently disapproved of the plan, because his presence at the meeting itself objectively served a "function" in the plan's development.

The novel *LoCascio* formulation of conspiratorial liability will have a broad impact on civil as well as criminal litigation. A party who could not incur such liability for his presence at a meeting under the standard instructional definition of an antitrust conspiracy[8] certainly could be found to have nonetheless played a "functional part" of such a conspiracy under the Second Circuit's holding. The potential repercussions of the Court of Appeals' approval of the district court's unprecedented charge merits review by this Court.

II. THE *LOCASCIO* COURT'S NOVEL EXPANSION OF CONSPIRATORIAL LIABILITY CREATES A CIRCUIT CONFLICT AND IS SQUARELY AT ODDS WITH THIS COURT'S DECISION IN *SULLIVAN v. LOUISIANA*

Because conspiracy liability casts a wide net of accountability, it has been limited in its reach by a cornerstone of criminal jurisprudence: one cannot be punished for his

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[8] *See* Devitt, Blackmar & O'Malley (4th Ed. 1990) § 90.07 Conspiracy — Defined — Proof of Existence ("Mere similarity of conduct among various persons, and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.")

thoughts alone. As Professor Goldstein long-ago noted, the "act" requirement of criminal liability is

> [r]ooted in skepticism about the ability either to know what passes through the minds of men or to predict whether antisocial behavior will follow from antisocial thoughts[.]

Goldstein, *Conspiracy To Defraud The United States*, 68 Yale L.J. 405, 405-406 (1958).

Courts historically have been careful to distinguish between a defendant's assertedly evil intent, and his *act* of agreeing to commit a criminal offense:

> So long as [an unlawful] . . . design rests in intention only, it is not indictable.
>
> When two agree to carry it into effect, the very plot is an act in itself. . . . The agreement is an advancement of the intention which each has conceived in his mind; the mind proceeds from a secret intention to the *overt act of mutual consultation and agreement.*

State v. Carbone, 10 N.J. 329, 336-37, 91 A.2d 571, 574 (1952) (emphasis added).

The *LoCascio* decision hurtles past the act requirement. It is now the case that the presence of a defendant at a conversation where a crime is discussed by another party renders that defendant culpable of conspiring to commit the crime discussed, as well as of the substantive crime itself (if it is later committed), if no more is proven than that the defendant is an advisor of the other party and precautions are taken to ensure the security of the conversation. The language of the opinion does not require that the defendant say anything to indicate he assents to the plan, or that the defendant knew the subjects to be discussed before he engaged in conversation with the proponent of criminality. The Circuit does not even limit its holding by acknowledg-

ing that an expression of dissent from the proposed plan would preclude the defendant's liability.

Such a ruling sets the Second Circuit against unquestioned precedents of various other Circuits. As the Eighth Circuit unambiguously has held,

> Mere association with the principal and even knowledge that a crime is about to be committed are . . . insufficient . . . without proof of culpable purpose. [Citation.] . . . "*[T]he necessity of proving facts other than presence has been explained as 'an essential safeguard against the ever present danger of assuming the complicity of all in attendance whenever group activity is involved.*' "

United States v. Grey Bear, 828 F.2d 1286, 1293 (8th Cir. 1987) (emphasis added), quoting *United States v. Barber*, 429 F.2d 1394, 1397 (3d Cir. 1970).

In *Grey Bear*, a host of defendants were charged with the death of a victim who was first beaten and then run over with a car. Eight of the defendants who were convicted of second degree murder took part only in the beating, and the government offered no evidence any of them intended to kill the victim. The Eighth Circuit reversed, holding that the presence of the defendants at the time and place of the murder was insufficient to prove ultimate culpability: "[W]e are convinced that the second degree murder convictions . . . stem from the 'ever present danger of *assuming the complicity of all in attendance whenever group activity is involved.*' " *Id.* at 1297 (emphasis added), quoting *Barber*, 429 F.2d 1394, 1397 (3d Cir. 1970).

The Second Circuit's ruling similarly is in conflict with other settled circuit law. *See e.g. United States v. Deicidue*, 603 F.2d 535, 548 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (court approves jury instruction that "mere presence at the scene of an alleged transaction or event or mere

similarity or conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy."); *United States v. Muskovsky*, 863 F.2d 1319 (7th Cir. 1988) ("To find defendant guilty of conspiracy to violate RICO, the government must show that the defendant 'was aware of the essential nature and scope of the enterprise and intended to participate in it.' *United States v. Bruun*, 809 F.2d [397, 410 (7th Cir. 1987)] . . . [T]he government does have to show more than 'mere association with conspirators, knowledge of a conspiracy, and presence during conspiratorial discussions. . . .' *United States v. Percival*, 756 F.2d 600, 610 (7th Cir. 1985).' ").

The *LoCascio* Court's expansion of settled notions of conspiratorial liability, while undertaken in a criminal context, can be expected to migrate into civil application. To the extent the Second Circuit has announced a "functional presence" rule applicable to all conspiracy cases, it is now in conflict with the Ninth Circuit, and with well-accepted jury instructions on the existence of a civil conspiracy.

In *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1970), for example, the Ninth Circuit reversed a plaintiff's verdict in an anti-trust action, holding that

> When an illegal conspiracy or agreement to restrain trade is charged, there must be evidence from which actual agreement or mutual consent can be found or inferred. [Citation.] Thus, evidence of meetings alone is not sufficient; there must also be evidence sufficient to permit the jury to infer illegal agreement.

Id. at 1359; *see supra*, Devitt, Blackmar & O'Malley (4th Ed. 1990) § 90.07 Conspiracy — Defined — Proof of Existence; § 103.23 Conspiracy to Interfere With Civil Rights

— Existence of a Conspiracy (mere presence and association insufficient to establish conspiracy).

Contrary to this precedent, both criminal and civil, the *LoCascio* panel has held that petitioner can be convicted of all of the crimes charged against him, including murder and conspiracy to murder, because he was an advisor of Gotti and participated in closed meetings with him. 6 F.3d at 945. That, of course, is what advisors in most organizations, be they entirely legitimate or criminally tainted, do. At such meetings, an advisor's silence could mean that he supports a course of action, actively opposes it, or declines to endorse it.

Furthermore, since the *LoCascio* opinion in affirming relies on nothing said by Locascio during the conversations, it effectively holds Locascio committed the crimes, *inter alia*, of murder and conspiracy to murder simply by entering, with the status of advisor, a room where those matters were discussed. The opinion imposes no requirement that a defendant like Locascio assent to the proposed crime during the discussions, and it contains no suggestion that the evidence in a case such as this would be insufficient if the defendant had activity *advised against* the commission of the charged crime during the discussion itself.

The government defended its case from Locascio's Rule 29 challenge by turning the "mere presence" limitation on conspiracy liability on its head:

> It is our position legally that Frank Locascio's presence served the purpose and that *he need not utter one word at all to be part of the conspiracy to kill Corky Vastola.*

(RT 6910) (emphasis added). It then argued to the jury that Locascio's presence in the apartment above the Ravenite rendered him guilty "*wholly apart from what he says or does.*" (RT 7825) (emphasis added).

Of equal importance, *LoCascio* does not require that a defendant know the content of a discussion before he agrees to be present at it. Here, for example, it would be impossible to argue that Locascio knew beforehand that Gotti would make a reference to "whacking" DiBono during his stream of consciousness monologue on December 12, 1989. The panel has thus effectively held that organizational advisors who enter meetings intended to be secure are responsible for any crime discussed during such a meeting, even if they are unaware at the time they enter the meeting what specific criminality will be discussed, and irrespective of whether they assent or dissent from the illegal proposal at the time it is made.

Last, but no means least, the Second Circuit has declared that presence can merit conviction on a showing which falls far short of guilt beyond a reasonable doubt. In the most telling sentence of its opinion the Circuit held that "the jury was entitled to consider whether it was *likely* that Locascio would have been present during those conversations if he were not a participant." 6 F.3d at 945. Therefore, the court below sustained findings of conspiratorial liability under an incorrect standard of proof: that of a *likelihood* of guilt rather than proof beyond a reasonable doubt. Needless to say, this holding is at variance not only with the opinions of other circuits cited above, but with this Court's recent and emphatic affirmation of the appropriate constitutional standard. *Sullivan v. Louisiana*, 508 U.S. ____, 113 S.Ct. ____, 124 L.Ed.2d 182, 188 (1993) ("It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty. . . .").

The conflict which now exists between other circuits' settled rules, and those of this Court, on the limits of

conspiratorial liability and the Second Circuit's "functional presence" formulation should be resolved on certiorari.[9]

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[9] The broad theory of vicarious liability used by the government in this case was particularly prejudicial and produced unfair convictions because of a separate instructional error affecting LoCascio's case. That error permitted the jury to hold petitioner liable for a series of uncharged crimes, including nine murders which LoCascio did not commit, introduced during the direct examination of Salvatore Gravano, evidence of which was concededly inadmissible against Locascio.

Over the government's attempt to use the uncharged offense evidence against LoCascio as related to the "enterprise," the district court repeatedly and correctly ruled that the uncharged murder evidence had been introduced for one purpose and one purpose alone: "for the purpose of eliciting on direct examination that Mr. Gravano had committed some bad acts in the past." The trial court was explicit that the evidence was not admissible "as other bad acts under 404(b)" and was not admissible "as tending to prove racketeering activity . . ." or other of the offenses charged against LoCascio.

The district court's ruling that the uncharged offense evidence was inadmissible except to impeach Gravano necessitated a limiting instruction, lest the jurors naturally and inevitably use it to view Locascio as culpable for multiple murders and other bad acts. The district court promised LoCascio's counsel that such an instruction would be given both during the charging conference when the defense requested it and as closing arguments began.

The district court then failed to charge the jury, as it promised it would, that "[t]hey are not to consider any other crimes or not to base their verdict or their judgment based upon crimes not charged in this indictment." No instructional limitation was placed on consideration of the inflammatory uncharged offense evidence, an error that in itself required reversal of LoCascio's convictions.

III. THE "FUNCTIONAL PRESENCE" THEORY EMPLOYED BY THE GOVERNMENT HERE CRIMINALIZES MEMBERSHIP AND STATUS IN AN ENTERPRISE, CONTRARY TO CONGRESSIONAL INTENT, AND RENDERS RICO UNCONSTITUTIONAL AS APPLIED IN THIS CASE

The "functional presence" theory and instruction were utilized by the government to convict petitioner not only on counts charging individual offenses, but on the parallel predicate act allegations at the heart of the umbrella RICO and RICO conspiracy charges. Thus, because the instruction and theory permitted LoCascio's conviction, for example, on the substantive counts of conspiracy to obstruct justice and to conduct gambling on evidence of membership and status in an organization, it likewise permitted RICO and RICO conspiracy convictions based on the use of those same crimes as predicate acts.

Yet the drafters of the RICO statute refused to criminalize mere membership or status in an organization, be it the "Mafia," "Cosa Nostra," or some other. *See* 116 Cong.Rec. 35,343 (1970):

> The amendment was vigorously attacked on constitutional grounds. Congressman Celler objected that such terms [i.e., organized crime] were "imprecise, uncertain, and unclear" and that mere membership in an organization should not be punished. [citation.] Congressman Poff (the bill's sponsor in the House) objected that such an amendment [criminalizing membership in an illegal organization] might violate the Supreme Court's rulings that struck down statutes

> which created status offenses. . . . Congress rejected the amendment. . . .

Id. at 35,344, quoted in *Moss v. Mogan Stanley Inc.*, 719 F.2d 5, 21 n.17 (2d Cir. 1983).

A defendant's association with an organized crime group is not itself an act of racketeering, nor may a defendant be held accountable for the racketeering acts of others. *United States v. Indelicato*, 865 F.2d 1370, 1384 (2d Cir. 1989); *United States v. Angelilli*, 660 F.2d 23, 41 (2d Cir. 1981).

To justify convictions on substantive counts and related racketeering acts, and thus on the RICO counts which rest on those acts, Congress required adequate evidence of a defendant's intentional participation in those individual offenses. A RICO conviction cannot rest on evidence of membership and participation in an alleged racketeering enterprise. *See, e.g., United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984) (RICO conspiracy requires willful participation in two predicate offenses in addition to conspiracy to participate in the affairs of a crime family by engaging in the predicate offenses).

By relying simply upon evidence that proves only that petitioner is a member of the charged enterprise, and by failing to require additional proof he intended to commit the specific offenses alleged, *LoCascio* has removed the statutorily intended limits on vicarious criminal liability in the RICO context.

Furthermore, weakening the proof requirement as to RICO predicate acts renders more muddled the elements of a statute that is already dangerously vague. Courts have repeatedly complained about the uncertainty and confusion engendered by the vague language of the RICO statute

since its adoption.[10] In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), four Justices of this Court (Rehnquist, O'Connor, Scalia and Kennedy), invited a constitutional challenge to RICO on the ground that its pattern element was impermissibly vague:

> No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

Id. at 255-256 (Scalia, J., concurring) (emphasis added).

Of importance, the *H.J. Inc.* majority (Brennan, Marshall, White, Blackmun, Stevens) did not disagree, but confirmed the vagueness inherent in the language of the statute, commenting that "the definitional problems that arise in interpreting RICO's pattern requirement inevitably lead to uncertainty regarding the statute's scope." *Id.* at 241 n.3 (emphasis added). The same Term as *H.J. Inc.*, in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), this Court upheld the Indiana "little RICO" statute as applied to obscenity offenses, but Justices Brennan, Marshall, and Stevens dissented on the ground that, although the obscen-

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[10] "Courts generally, and courts in the Second Circuit in particular, remain confused (and certainly confusing) in their construction of the statutes governing . . . RICO." *Beauford v. Helmsley*, 843 F.2d 103, 104 (2d Cir. 1988), *vacated*, 865 F.2d 1386 (2d Cir.) (en banc), *vacated*, 109 S. Ct. 3236 (1989); *see also, United States v. Monsanto*, 836 F.2d 74, 86 (2d Cir. 1987) (Oakes, J., dissenting) (RICO and CCE cases involve vague statues and severe penalties"), *vacated*, 852 F.2d 1213, 1220 (5th Cir. 1989) ("RICO . . . is an unusually confusing and convoluted statute."); *Davies v. Continental Bank*, 122 F.R.D. 475 (E.D. Pa. 1988) ("amorphous legal standards."); *Spencer Companies, Inc. v. Agency Rent-ACar*, Fed. Sec. L. Rep. (CCH) ¶ 98,361 at 92,217 (D. Mass. 1981) ("the very breadth and vagueness of the RICO statute").

ity statute might be constitutional, the state's RICO statute was unconstitutionally vague. *Id.* at 76-77 (Stevens, J., dissenting and concurring in part).

Given the vagueness problem attendant to the pattern element of RICO, virtually the only certain elements of a RICO offense are those contained in the statutory definitions of the crimes charged as predicate acts. If the charged predicate acts are conspiracies, however, and if the barrier to conspiracy convictions based on membership and status alone is lowered, as it has been here, the constitutional problem of vagueness posed by RICO is exponentially aggravated. The unprecedented "functional presence" theory and instruction utilized to convict petitioner on RICO charges stretched the statute beyond the constitutional breaking point.

This Court should act to prevent the constitutional abuses that will result from a rule permitting conviction under RICO without adequate proof of a defendant's intent and agreement to commit the specific offenses charged as predicate acts.

CONCLUSION

For the reasons stated, this Court should grant the petition for certiorari to consider the important questions presented.[11]

Dated: March 7, 1994

Respectfully submitted,

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[11] In addition to the questions presented herein, petitioner joins in the questions presented for review by his co-defendant, John Gotti.

APPENDIX A

Nos. 817, 931, 1305 and 1782,
Dockets 92-1382, 92-1384, 92-1671 and 93-1181.

United States Court of Appeals,
Second Circuit.

UNITED STATES OF AMERICA,
Appellee,
v.
FRANK LOCASCIO, AND JOHN GOTTI,
Defendants-Appellants.

Argued June 17, 1993.

Decided Oct. 8, 1993.

Defendants were convicted of substantive and conspiracy violations of Racketeer Influenced Corrupt Organizations Act (RICO), following jury trial in the United States District Court for the Eastern District of New York, Israel Leo Glasser, J., and they appealed. The Court of Appeals, Altimari, Circuit Judge, held that: (1) disqualification of defense attorneys was warranted; (2) expert testimony on crime families was admissible; (3) jury instructions on murder and murder conspiracy counts were not erroneous; (4) jury instructions on RICO "pattern" were proper; (5) conspiracy conviction was not based on defendant's mere presence among conspirators; (6) improper statement by prosecutor was not reversible error; (7) sequestration of jury did not deny defendants fair trial; (8) defendant was not entitled to severance; and (9) newly discovered evidence relating to prosecution witness did not require new trial.

Affirmed.

Kearse, Circuit Judge, filed concurring opinion.

John Gleeson, James Orenstein, Asst. U.S. Attys., New York City (Mary Jo White, U.S. Atty., E.D.N.Y., New York City, David C. James, Asst. U.S. Atty., E.D.N.Y., New York City, of counsel), for appellee.

Charles Ogletree, Boston, MA (Ephraim Margolin, Margolin, Arguimbau & Battson, San Francisco, CA, of counsel), for defendant-appellant John Gotti.

Michael E. Tigar, Austin, TX (Dennis P. Riordan, Riordan & Rosenthal, San Francisco, CA, Michael Kennedy, Michael Kennedy, P.C., New York City, of counsel), for defendant-appellant Frank Locascio.

Before: KEARSE, MINER, and ALTIMARI, Circuit Judges.

ALTIMARI, Circuit Judge:

Defendants-appellants John Gotti and Frank Locascio appeal from judgments of conviction entered on June 23, 1992 in the United States District Court for the Eastern District of New York (Glasser, *J.*). They also appeal from the district court's October 30, 1992 order denying their motion for a new trial and a subsequent denial of a renewed motion for a new trial.

Gotti and Locascio were convicted after a jury trial of substantive and conspiracy violations of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1962(c) and (d) (1988), and various predicate acts charged as separate counts. They were each principally sentenced to life imprisonment. The charges stemmed from their involvement with the Gambino Crime Family of La Cosa Nostra, an extensive criminal organization.

On appeal, Gotti and Locascio raise numerous challenges to their convictions and the subsequent denial of their motion for a new trial. For the reasons stated below, we affirm the judgments of the district court.

BACKGROUND

On July 18, 1991, a grand jury in the Eastern District of New York returned a thirteen count superseding indictment against Gotti and Locascio. The indictment also named two other defendants, Salvatore Gravano and Thomas Gambino, who are not parties to this appeal. All four defendants were charged with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c)-(d) (1988), for unlawfully conducting and participating in the affairs of a criminal enterprise through a pattern of racketeering activity. The charged enterprise was the Gambino Organized Crime Family of La Cosa Nostra ("the Gambinos," "The Gambino Family," or "the Gambino Crime Family"). Gotti was charged as the head of the organization, and Locascio was accused of being the "underboss," or second-in-command.

Gravano was charged as the "consigliere," or advisor, to Gotti. Following the indictment, Gravano pleaded guilty to a superseding racketeering charge and testified at length at trial against Gotti and Locascio. The charges against Gambino, a "captain" in the organization, were severed.

Counts One and Two of the indictment charged Gotti and Locascio with the substantive and conspiracy violations of RICO. Many of the crimes charged as racketeering acts in the RICO counts were also the basis of separate counts in the indictment. Gotti was charged with the following predicate acts: the conspiracy to murder and the murder of Paul Castellano; the murder of Thomas Bilotti; the conspiracy to murder and the murder of Robert DiBernardo; the conspiracy to murder and the murder of Liborio Milito; and obstruction of justice at the Thomas Gambino trial. Gotti and Locascio were both charged with the following predicate acts: the conspiracy to murder and the murder of Louis DiBono: the conspiracy to murder Gaetano Vastola; conducting an illegal gambling business in Queens, New York;

conducting an illegal gambling business in Connecticut; conspiracy to make extortionate extensions of credit; and obstruction of justice in the investigation of the Castellano murder. Gotti and Locascio were also charged in separate counts for a conspiracy to obstruct grand jury investigations, bribery of a public servant, and a conspiracy to defraud the United States.

Gotti and Locascio were tried before a sequestered anonymous jury in the United States District Court for the Eastern District of New York (Glasser, *J.*). Prior to trial, there were numerous government and defense motions, most of which need not be recounted at length. The motions that are the subject of this appeal included: the government's successful motion to sequester an anonymous jury; the government's successful motion to disqualify counsel for both Gotti and Locascio for various conflicts of interest; and Locascio's unsuccessful motion to sever his trial from Gotti's.

Trial began in February 1992. The government's proof to support the allegations that Gotti and Locascio had been in command of an extensive criminal enterprise was comprised mostly of lawfully intercepted tape-recorded conversations of the defendants-appellants and other alleged members of the Gambino Family. The government introduced tape recordings from four different locations over an eight-year period.

The most significant evidence consisted of conversations intercepted at 247 Mulberry Street in New York during the period from late 1989 until early 1990. The government had installed three listening devices in that building: in the Ravenite Social Club on the first floor, in a hallway behind the club's rear door, and in an apartment two stories above the club ("the Ravenite Apartment".) It was this last location that proved the most fruitful for the government, and the most damaging for the defendants-appellants. In the

discussions in the Ravenite Apartment, Gotti, Locascio, and other Gambino Family members discussed various illegal acts. These discussions formed the core of the proof against the defendants-appellants at trial. Another major source of evidence was the testimony of Salvatore Gravano, who cooperated with the government following the indictment. As a high-level insider in the Gambino Family, Gravano's testimony was especially damaging.

The tape recordings, combined with Gravano's testimony, presented to the jury a picture of a large-scale enterprise involved in various criminal activities. The jury heard evidence on the structure and inner workings of the Gambino Family, and learned of the miscellaneous crimes with which Gotti and Locascio were charged: murders, obstruction of legal proceedings, conspiracies, gambling operations, and loansharking activities. It is unnecessary to recount the evidence in detail at this point, since much of it is unnecessary for full understanding of the issues on appeal.

Following a six-week trial, the jury found Gotti guilty of all charges in the indictment. Locascio was found guilty of all charges except the count relating to a gambling operation in Queens, New York. Each defendant-appellant was sentenced by the district court to life in prison on the RICO and murder counts, and the statutory maximum prison terms on all remaining counts, with all sentences to run concurrently. The court also imposed five years of supervised release, a $250,000 fine on each defendant, and mandatory special assessments.

Several months after sentencing, government attorneys discovered previously undiscovered reports that potentially pertained to Gravano's credibility. The government turned over those reports to the defendants-appellants, who subsequently moved for a new trial pursuant to Fed.R.Crim.P. 33, on the ground that the government had not disclosed relevant evidence under *Brady v. Maryland*, 373 U.S. 83, 88

S.Ct. 1194, 10 L.Ed.2d 215 (1963). This motion and a later renewed motion were both denied by the district court.

On appeal, Gotti and Locascio raise myriad challenges to their convictions and to the subsequent denial of their new trial motions. They contend that the district court erred in: (1) disqualifying counsel for both Gotti and Locascio for conflicts of interest; (2) allowing certain government expert testimony; (3) instructing the jury; (4) allowing evidence of other crimes that were inadmissible against them; (5) impanelling an anonymous sequestered jury; (6) refusing to sever Locascio's trial; and (7) denying a motion for a new trial based on the government's suppression of material relting to Gravano's credibility. The defendants-appellants also argue that they were denied a fair trial based on the government's suppression of exculpatory evidence and prosecutorial misconduct.

For the following reasons, we affirm the judgment of the district court.

I. *Disqualification of Counsel*

Prior to trial, the district court disqualified attorneys for both Gotti and Locascio. Gotti and Locascio now contend that these disqualifications were unwarranted and violated their Sixth Amendment rights.

A. *Applicable Law*

[1, 2] The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const.Amend. VI. The accused, however, does not have the absolute right to counsel of her own choosing. *See Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988). As the Court stated in *Wheat*,

> while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

Id. Similarly, although a criminal defendant can waive her Sixth Amendment rights in some circumstances, that right to waiver is not absolute, since "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* at 160, 108 S.Ct. at 1698. The question of disqualification therefore implicates not only the Sixth Amendment right of the accused, but also the interests of the courts in preserving the integrity of the process and the government's interests in ensuring a just verdict and a fair trial. *See id.*

[3, 4] In deciding a motion for disqualification, the district court recognizes a presumption in favor of the accused's chosen counsel, although this presumption can be overcome by a showing of an actual conflict or potentially serious conflict. *See id.* at 164, 108 S.Ct. at 1699; *United States ex rel. Stewart v. Kelly*, 870 F.2d 854, 856 (2d Cir. 1989). We accord the district court's decision to disqualify an attorney "substantial latiture," and review the decision only for an abuse of discretion. *Wheat*, 486 U.S. at 163-64, 108 S.Ct. at 1699.

There are many situations in which a district court can determine that disqualification of counsel is necessary. The most typical is where the district court finds a potential or actual conflict in the chosen attorney's representation of the accused, either in a multiple representation situation, *see Wheat*, 486 U.S. at 159-60, 108 S.Ct. at 1697-98; *United States v. DiTommaso*, 817 F.2d 201, 219 (2d Cir.1987);

United States v. Curcio, 680 F.2d 881, 886 (2d Cir.1982), or because of the counsel's prior representation of a witness or co-defendant, *see Stewart*, 870 F.2d at 856-57. Courts have also considered disqualification where the chosen counsel is implicated in the allegations against the accused and could become an unsworn witness for the accused, *see United States v. Arrington*, 867 F.2d 122, 129 (2d Cir.), *cert. denied*, 493 U.S., 817, 110 S.Ct. 70, 107 L.Ed.2d 37 (1989); *United States v. Kwang Fu Peng*, 766 F.2d 82, 87 (2d Cir.1985), or where the chosen counsel is somehow unable to serve without unreasonable delay or inconvenience in completing the trial, *see United States v. Scopo*, 861 F.2d 339, 344 (2d Cir.1988), *cert. denied*, 490 U.S. 1048, 109 S.Ct. 1957, 104 L.Ed.2d 426 (1989).

In this case, the government moved to disqualify attorneys for both Gotti and Locascio on multiple theories. We consider each of the defendants-appellants in turn.

B. *Gotti*

1. *Background*

Bruce Cutler served as Gotti's attorney in previous criminal trials in federal court. Prior to trial, the government moved to disqualify Cutler from acting as Gotti's attorney. Although the motion also dealt with the disqualification of other Gotti attorneys, only the disqualification of Cutler has been challenged on appeal.

The district court granted the motion to disqualify on several grounds. *United States v. Gotti*, 771 F.Supp. 552 (E.D.N.Y. 1991). Judge Glasser, in a thoughtful and well-reasoned opinion, found that Cutler had acted as "house counsel" to the Gambino Crime Family by receiving "benefactor payments" from Gotti to represent others in the criminal enterprise. *Id.* at 560. The district court based this conclusion on excerpts from the government's taped tran-

scripts, which left "little doubt that Gotti paid significant sums of money for legal services rendered to others." *Id.*

The district court further determined that Cutler's participation in government-conversations at which illegal activity was discussed would impair his representation of Gotti. *Id.* at 562-63. Specifically, the court noted that Cutler's mere presence at trial could make him an "unsworn witness" before the jury in explaining his own conduct and interpreting Gotti's conversations on the tapes. *Id.* at 563. Even if Gotti waived the conflict, and even if the government did not intend to call Cutler as a witness, the district court found that Cutler's representation would still compromise the integrity of the proceeding. *Id.*

Third, the district court found that Cutler's prior representation of Michael Coiro, a potential government witness, gave rise to a conflict of interest. *Id.* The court reasoned that this conflict mandated disqualification both because Cutler was privy to events surrounding an obstruction charge, and because Cutler's cross examination of Coiro at trial would be circumscribed by the prior representation. *Id.* at 563-65.

Finally, the district court also found disqualification warranted because of the implication by Gotti in taped conversations that he had paid Cutler money "under the table." *Id.* at 565. This made Cutler a potential accomplice as well as a potential witness to Gotti's tax fraud.

In conclusion, the district court noted that it was mindful that disqualification is a drastic remedy for conflict problems, but that no less severe alternatives were viable. *Id.* at 566. The court therefore held that "the grave peril the continued representation by [Cutler] poses to the integrity of the trial process" mandated disqualification. *Id.*

[5] Gotti now appeals the district court's ruling, arguing that the disqualification was an abuse of discretion. We disagree, and affirm the disqualification on two grounds:

(1) Cutler's role as house counsel to the Gambino Crime Family; and (2) Cutler's anticipated role as an "unsworn witness" for Gotti had he been allowed to serve. We note that, importantly, Gotti does not challenge the effectiveness of his replacement trial counsel. Although the government cannot justify an otherwise unwarranted disqualification by arguing that the disqualification did not result in the accused receiving ineffective assistance of counsel, *see United States v. Diozzi*, 807 F.2d 10, 16 (1st Cir.1986), the fact that Gotti received more than competent representation is an additional consideration strongly supporting the district court's otherwise entirely correct ruling.

2. *Cutler's Role as House Counsel*

[6] Gotti argues that the facts before the district court did not merit the conclusion that Cutler had acted as "house counsel" to the Gambino Crime Family. Rather, Gotti argues that Cutler was merely his personal attorney.

Ethical considerations warn against an attorney accepting fees from someone other than her client. As we stated in a different context, the acceptance of such "benefactor payments" "may subject an attorney to undersirable outside influence" and raises an ethical question "as to whether the attorney's loyalties are with the client or the payor." *In re Grand Jury Subpoena Served Upon John Doe*, 781 F.2d 238, 248 n. 6 (2d Cir.1985) *(in banc)*, *cert. denied*, 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986). In this context, proof of house counsel can be used by the government to help establish the existence of the criminal enterprise under RICO, by showing the connections among the participants. *See United States v. Simons*, 923 F.2d 934, 949 (2d Cir.) (holding that government can use evidence of benefactor payments to prove existence of enterprise), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2018, 114 L.Ed.2d 104 (1991); *United States v. Castellano*, 610 F.Supp. 1151

(S.D.N.Y. 1985) (disqualifying attorney because attorney's aceptance of benefactor payments could be used to prove existence of enterprise).

Contrary to Gotti's assertions, there was sufficient evidence for the district court to determine that Cutler had acted as house counsel to the Gambino Crime Family. For example, the court cited one conversation in which Gotti, in the time-honored tradition of legal clients, complained about his legal fees:

> I gave youse [sic] 300,000 in one year. Youse [sic] didn't defend me. I wasn't even mentioned in none of these [expletive deleted] things. I had nothing to do with none of these [expletive deleted] people. What the [expletive deleted] is your "beef?" . . . Before youse [sic] made a court appearance, youse [sic] got 40,000, 30,000 and 25,000. That's without counting [attorney] John Pollok . . . . You standing there in the hallway with me last night, and you're plucking me . . . . "Tony Lee's" lawyer, but you're plucking me. I'm paying for it . . . . Where does it end? Gambino Crime Family? This is the Shargel, Cutler and who do you call it Crime Family.

771 F.Supp. at 555. Gotti thus demonstrated that he was incurring the legal fees for representation of others. As support for disqualification, the government indicated that it would introduce the testimony of Michael Coiro, who would testify that he had paid nothing to Cutler and another attorney for their services to him, presumably because Gotti paid for his defense.

Cutler's role as house counsel to the Gambinos raised a credible issue of the ethical propriety of his representation of Gotti in this case. An attorney cannot properly serve two masters, and the evidence before the district court indicated that Cutler had represented the Gambino Family as a

whole. Moreover, Cutler's status as house counsel was potentially part of the proof of the Gambino criminal enterprise. We cannot say that the district court abused its discretion in disqualifying Cutler on this basis, considering the volume of proof of Cutler's proximity to the affairs of the Gambino Crime Family offered by the government in this case.

3. *Cutler's Role as an Unsworn Witness*

[7] An even stronger basis for disqualification, however, was the possibility that Cutler would function in his representational capacity as an unsworn witness for Gotti. An attorney acts as an unsworn witness when his relationship to his client results in his having first-hand knowledge of the events presented at trial. If the attorney is in a position to be a witness, ethical codes may require him to withdraw his representation. *See* Model Code of Professional Responsibility DR 5-102(A) (1992).

Even if the attorney is not called, however, he can still be disqualified, since his performance as an advocate can be impaired by his relationship to the events in question. For example, the attorney may be constrained from making certain arguments on behalf of his client because of his own involvement, or may be tempted to minimize his own conduct at the expense of his client. Moreover, his role as advocate may give his client an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross examination. *See United States v. McKeon*, 738 F.2d 26, 34-35 (2d Cir.1984) (requiring disqualification where attorney would be essentially acting as both an advocate and a witness); *United States v. Cunningham*, 672 F.2d 1064, 1075 (2d Cir.1982) (upholding disqualification where an attorney would act as an unsworn witness for defendant); *Castellano*, 610 F.Supp. at 1167 (finding that

attorney's appearance at counsel table would itself distort the factfinding process).

[8] This is different from the situation in *Wheat,* since the conflict in *Wheat*—multiple representation—was a conflict inuring to the detriment of the accused. In such a case, waiver by the accused of the conflict can conceivably alleviate the constitutional defect, so long as the representation by counsel does not seriously compromise the integrity of the judicial process. When an attorney is an unsworn witness, however, the detriment is to the government, since the defendant gains an unfair advantage, and to the court, since the factfinding process is impaired. Waiver by the defendant is ineffective in curing the impropriety in such situations, since he is not the party prejudiced. *See Cunningham,* 672 F.2d at 1074-75.

The district court disqualified Cutler partially on the ground that his representation of Gotti would place him in the role of such an unsworn witness. The clearest support for this finding was Cutler's presence during the Ravenite Apartment discussions taped by the government. The government was legitimately concerned that, when Cutler argued before the jury for a particular interpretation of the tapes, his interpretation would be given added credibility due to his presence in the room when the statements were made. This would have given Gotti an unfair advantage, since Cutler would not have had to take an oath in presenting his interpretation, but could merely frame it in the form of legal argument.

[9] Gotti argues, however, that the district court erred in disqualifying Cutler where the government had no intention of calling Cutler. He also maintains that Cutler's presence and participation on the government's tapes could have been redacted to eliminate references to and statements by Cutler, thereby eliminating the unsworn witness problem. The first contention is meritless, since the district court explicitly

and correctly noted that "whether the government will or will not call . . . Cutler . . . has no significance for this motion." 771 F.Supp. at 562. The second contention is equally unavailing, since the district court explicitly found that redaction of the tapes would have eviscerated the government's case. We are not in a position to second-guess the district court's clearly supported factual findings on review. Moreover, we agree with the district court that the government's case should not be unfairly impaired so that an accused can continue with conflicted counsel.

The unsworn witness problem arises not only in relation to the Ravenite tapes, but to other grounds cited by the district court in support of disqualification. For example, the court found that Gotti's references to Cutler's acceptance of fees "under the table" were relevant to the government's case on the tax fraud count. Had Cutler argued Gotti's defense to that count, he would not only have had a conflict of interest but he would have been arguing as to events in which he was allegedly involved.

We are aware that disqualification is a drastic remedy to the unsworn witness problem. We are also, however, cognizant that this is an unusual case, in that Cutler had allegedly entangled himself to an extraordinary degree in the activities of the Gambino Crime Family: he is recorded on government tapes when discussions of allegedly illegal activity took place; he is allegedly involved in the tax fraud count against Gotti; his role as house counsel could be used to prove the criminal enterprise; and his representation of government witnesses caused a conflict with his representation of Gotti. Although we are cognizant of the right of the accused to secure representation, we are also conscious of the institutional interest in protecting the integrity of the judicial process. If an attorney will not perform his ethical duty, it is up to the courts to perform it for him. Bruce Cutler had no

place representing John Gotti in this case, and the district court properly determined that he should be disqualified.

C. *Locascio*

Locascio challenges the district court's disqualification of attorney George Santangelo, arguing that the district court abused its discretion in disqualifying Santangelo. Santangelo was disqualified for much the same reasons as Cutler: (1) because Santangelo was house counsel to the Gambino Crime Family; and (2) because Santangelo could conceivably become an unsworn witness if he represented Locascio.

1. *Background*

On January 6, 1992, thirteen months after Locascio's indictment, Santangelo filed a notice of appearance on behalf of Locascio. The government quickly moved for disqualification. The motion was argued on January 17, 1992 and granted four days later. *United States v. Gotti*, 782 F.Supp. 737 (E.D.N.Y. 1992).

The district court began by reviewing the evidence presented by the government that Santangelo was house counsel to the Gambino Family. The court noted that Gravano was expected to testify that, after arraignment, Gotti had stated to him that Gotti was going to assign Santangelo to represent either Gravano or Locascio. Gravano was also expected to testify that Gotti controlled the actions of attorneys answerable to him, in the interests not of the individual clients but of the Gambino Family. The court found that this testimony would support the inference that Santangelo was "answerable to Gotti," which was probative of the charged RICO enterprise. The court also reviewed intercepted conversations presented by the government that supported Gravano's allegations that Gotti controlled Santangelo. The district court concluded:

> Santangelo's relationship to Gotti and to Gotti's associates is properly the object of proof by the government in its case in chief. But, as with Cutler, . . . Santangelo cannot present himself as counsel for the defendants when his relationship to those defendants is itself an issue under the consideration of the jury. His presence at counsel table could readily serve as a signal to the jury that the court discounts the government's proof on this point—that the court does not believe this evidence. Moreover, Santangelo could not argue against the existence of the charged RICO enterprise without becoming an unsworn witness.

Id. at 741.

2. *Discussion*

We have already discussed the applicable law on the issue of counsel disqualification. *See supra* § I.A. Locascio offers the same arguments that we rejected in our discussion of the disqualification of Bruce Cutler. Simply put, Locascio recharacterizes the record and disagrees that the government proffered evidence to the district court that merits disqualification of Santangelo.

As in our discussion of Cutler's disqualification, we review the district court's rulings only for an abuse of discretion. *Wheat*, 486 U.S. at 163-64, 108 S.Ct. at 1699; *Stewart*, 870 F.2d at 856. Here, the district court specifically found that Gravano's testimony and the intercepted conversations substantiated the argument that Santangelo was house counsel. This raised two serious conflicts of interest: first, that Santangelo's previous representations of Gambino Family members would be used to prove the existence of the enterprise; and second, that his loyalty to Locascio would be compromised by his relationship to Gotti. These findings were supported in the record, and Locascio's recharacterization of the record does not compel us to reverse them.

As discussed previously, Locascio's Sixth Amendment concerns are not the only interests at stake here: the district court has an independent duty to protect the integrity of the judicial process, and the government has its own fair trial interests that should not be unnecessarily impaired so that Locascio can enjoy the services of ethically compromised counsel. This is especially true in these circumstances, since Locascio suffered no prejudice from the disqualification of Santangelo. Although actual prejudice is not determinative of the propriety of a disqualification, it is worth noting that this is not a case where an attorney worked on a case for months only to be disqualified on the eve of trial. Santangelo filed his first notice of appearance on January 6, 1992, and was disqualified fifteen days later. Locascio cannot argue this disqualification impacted his ability to prepare for trial.

D. *Conclusion*

Although disqualification is a drastic measure, the district court is in the best position to evaluate what is needed to ensure a fair trial. Here, the district court made careful findings of fact on each disqualification, and supported its decisions with well-reasoned opinions. We conclude that the district court properly exercised its discretion in disqualifying Bruce Cutler and George Santangelo.

II. *Admission of Expert Testimony*

Gotti and Locascio both contend that the district court committed reversible error in admitting the testimony of government experts to assist the jury in understanding the structure of organized crime families. More specifically, they principally challenge various facets of FBI Agent Lewis Schiliro's testimony, arguing that: (1) Schiliro's testimony was too broad and went beyond the scope of expert testimony; (2) he was not properly qualified as an expert; (3) his use of hearsay and un-introduced evidence to substantiate his opinions violated Fed.R.Evid. 703, as well as the Con-

frontation Clause; and (4) the availability of similar testimony by an accomplice witness rendered his testimony unnecessary.

A. *Background*

At trial, Special Agent Schiliro testified at great length on the nature and function of organized crime families, imparting the structure of such families and disclosing the "rules" of the La Cosa Nostra. For example, Schiliro testified that a "boss" must approve an illegal activity and especially all murders, and that the functions of the "consigliere" and "underboss" are only "advisory" to the "boss." In addition, as part of his testimony, he interpreted the numerous surreptitiously taped conversations introduced into evidence, and identified the individuals speaking by their voices. Schiliro specifically named John Gotti as the boss of the alleged Gambino Family and Gravano as the consigliere. Additionally, he identified, together with their titles, ranks, and functions, numerous members and associates of the Gambino Family and other criminal organizations. When pressed about his sources for individuals' titles, ranks, and functions, Schiliro admitted that his sources of information were not necessarily before the court.

B. *Discussion*

[10] Under the Federal Rules of Evidence, an expert is permitted to testify in the form of an opinion or otherwise when that testimony would "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. In determining whether such evidence will assist the jury, the district court must make a " 'common sense inquiry" ' into " 'whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." ' Fed.R.Evid. 702, advisory com-

mittee note, (quoting Ladd, *Expert Testimony*, 5 Vand.L.Rev. 414, 418 (1952)), *quoted in United States v. Onumonu*, 967 F.2d 782, 788 (2d Cir.1992). In applying this standard, the district court has broad discretion regarding the admission of expert testimony, and this Court will sustain the admission unless "manifestly erroneous." *United States v. DiDomenico*, 985 F.2d 1159, 1163 (2d Cir.1993); *United States v. Rivera*, 971 F.2d 876, 887 (2d Cir.1992).

Gotti and Locascio contend that the district court erred in admitting Schiliro's testimony for several reasons. The thrust of their argument is that Schiliro did not actually testify as an expert, but rather was simply a conduit allowing inadmissible evidence and arguments to flow into the court. They assert that Schiliro's testimony was too broad, sweeping, and unsubstantiated to be admissible. We will consider their specific points in turn.

1. *Challenge to Scope of Expert Testimony*

[11] The defendants-appellants challenge the admission of expert testimony on the inner workings of the Gambino Family as being outside the scope of expert testimony. We have, however, previously upheld the use of expert testimony to help explain the operation, structure, membership, and terminology of organized crime families. *See United States v. Daly*, 842 F.2d 1380, 1388 (2d. Cir.), *cert. denied*, 488 U.S. 821, 109 S.Ct. 66, 102 L.Ed.2d 43 (1988); *see also United States v. Skowronski*, 968 F.2d 242, 246 (2d Cir.1992) (upholding expert testimony of government agents explaining organized crime jargon); *United States v. Tutino*, 883 F.2d 1125, 1134 (2d Cir.1989) (same), *cert. denied*, 493 U.S. 1081, 110 S.Ct. 1139, 107 L.Ed.2d 1044 (1990); *United States v. Ardito*, 782 F.2d 358, 363 (2d Cir.) (same), *cert. denied*, 475 U.S. 1141, 106 S.Ct. 1792, 90 L.Ed.2d 338 (1986); *United States v. Gallo*, 118 F.R.D. 316, 317-18 (E.D.N.Y. 1987) (FBI agents could testify as

experts as to methods of operation of organized crime). Other circuits considering the issue are in agreement. *See United States v. Pungitore*, 910 F.2d 1084, 1148-49 (3d Cir.1990) (upholding testimony of agent who testified about structure of organized crime families), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2009, 114 L.Ed.2d 98 (1991); *United States v. Angiulo*, 847 F.2d 956,973-75 (1st Cir.) (same), *cert. denied*, 488 U.S. 852, 109 S.Ct. 138, 102 L.Ed.2d 110 (1988).

In *Daly*, this Court confronted a similar claim that a district court committed reversible error in admitting expert testimony on the structure of organized crime families. There, the government agent who testified "identified the five organized crime families that operate in the New York area; he described their requirements for membership, their rules of conduct and code of silence, and the meaning of certain jargon, . . . and he described how, in general, organized crime has infiltrated labor unions." 842 F.2d at 1388. Additionally, the expert identified voices on surveillance tapes. In sustaining the admission of such testimony, we explained that such expert testimony "was relevant to provide the jury with an understanding of the nature and structure of organized crime families." *Id.* We further added that there was "no question that there was much that was outside the expectable realm of knowledge of the average juror." *Id.*

We continue to believe that despite the unfortunate fact that our society has become increasingly familiar with organized crime and its activities from such sources as newspapers, movies, television, and books, it is still a reasonable assumption that jurors are not well versed in the structure and methods of organized crime families. Moreover, much of the information gleaned from such sources may be inaccurate. Consequently, the subject matter of

Agent Schiliro's testimony, namely the structure and operations of organized crime families, was properly admitted.

2. *Schiliro's Qualifications as an Expert*

[12] The defendants-appellants argue that Schiliro was not properly qualified as an expert, since his testimony required knowledge of linguistics, the sociology of crime, tape recording technology, and voice analysis. Gotti and Locascio contend that because he was not an expert in any of those areas, he was not qualified to interpret tapes or give his opinion on the Gambino Family structure.

This argument ignores the fact that Schiliro had been an FBI agent for seventeen years, and for five years had been on the FBI's Organized Crime Program, a squad that investigated only organized crime cases. For more than two years, he was the supervisor of the Organized Crime Program. Rule 702 only requires that an expert witness have "scientific, technical, or other specialized knowledge" gained through "knowledge, skill, experience, training, or education." Fed.R.Evid. 702. Because Schiliro's background qualifies as "specialized knowledge," the district court did not err in qualifying him as an expert. *See United States v. Simmons*, 923 F.2d 934, 946 (2d Cir.) (holding that a veteran DEA agent was "well-suited" to offer expert testimony about coded narcotics terminology), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2018, 114 L.Ed.2d 104 (1991); *United States v. Roldan-Zapata*, 916 F.2d 795, 804-05 (2d Cir.1990) (holding that a narcotics investigator was properly qualified to testify about "the narcotics-related nature" of items found in a defendant's apartment and about "drug trafficking techniques generally"), *cert. denied*, 499 U.S. 940, 111 S.Ct. 1397, 113 L.Ed.2d 453 (1991). Schiliro did not need to be a voice analysis expert to be able to recognize the defendants-appellants' voices on the tapes, nor did he need a linguistics degree to understand what was

being said. Schiliro testified as an expert on organized crime, and he was sufficiently qualified on that basis. Although he had never before been qualified as an expert witness, even the most qualified expert must have his first day in court.

3. *Sources of Information*

[13] Defendants-appellants next argue that because Schiliro relied upon "countless nameless informers and countless tapes not in evidence," his testimony violated Fed.R.Evid. 703 and the Confrontation Clause of the Sixth Amendment. The government responds that, although Schiliro relied upon information that was not before the court, this reliance is permitted under the rules of evidence.

[14] According to Rule 703, the facts that form the basis for an expert's opinions or inferences need not be admissible in evidence "[i]f of a type *reasonably relied* upon by experts in the particular field." Fed.R.Evid. 703 (emphasis added). Thus, expert witnesses can testify to opinions based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions. *See Daly*, 842 F.2d at 1387 (holding that organized crime expert can rely on otherwise inadmissible hearsay in forming his opinion); *cf. Reardon v. Manson*, 806 F.2d 39, 42 (2d Cir.1986) (holding that reliance by experts on information provided by others does not violate Sixth Amendment rights if expert is available for cross examination), *cert. denied*, 481 U.S. 1020, 107 S.Ct. 1903, 95 L.Ed.2d 509 (1987). Therefore, Schiliro was entitled to rely upon hearsay as to such matters as the structure and operating rules of organized crime families and the identification of specific voices heard on tape in forming his opinion, since there is little question that law enforcement agents routinely and reasonably rely upon such hearsay in the course of their duties. An expert who meets the test of Rule 702, as Schiliro does, is assumed "to have the skill to

properly evaluate the hearsay, giving it probative force appropriate to the circumstances." *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1223, 1245 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir.1987), *cert. denied*, 487 U.S. 1234, 108 S.Ct. 2899, 101 L.Ed.2d 932 (1988). The fact that Schiliro relied upon inadmissible evidence is therefore less an issue of admissibility for the court than an issue of credibiity for the jury. *See United States v. Young*, 745 F.2d 733, 761 (2d Cir.1984) (pointing out that the defendants were free to expose the weaknesses in the prosecution's widespread use of expert testimony through cross examination), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985).

[15-17] Gotti and Locascio do not seriously contest the point that hearsay and other inadmissible evidence are often reasonably relied upon by law enforcement agents in the field, and that this reliance is anticipated by Rule 703. Rather, they argue that a district court admitting expert testimony based on inadmissible evidence must make an explicit finding that the underlying sources of information used by the expert are trustworthy. *See Barrel of Fun, Inc. v. States Farm Fire & Casualty Co.*, 739 F.2d 1028, 1033 (5th Cir.1984) (holding that an expert's testimony was inadmissible because the factual premises underlying the opinion were "inherently suspect"). We agree that a district court is not bound to accept expert testimony based on questionable data simply because other experts use such data in the field. The Supreme Court's recent decision of *Daubert v. Merrell Dow Pharmaceuticals Inc.*, ____U.S. ____, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), makes this clear. In *Daubert* the Court abandoned the traditional rule of *Frye v. United States*, 293 F.#1013, 1014 (D.C. Cir.1923), which required "general acceptance" in the particular field before novel scientific evidence or techniques could be admitted in court. The Court in *Daubert* asserted that such a rigid standard for admitting expert scientific

testimony was inconsistent with the liberal thrust of the federal rules, ____ U.S. at ____, 113 S.Ct. at 2794, holding that district courts have the authority and discretion to determine whether novel scientific evidence is trustworthy. *Id.* at ____, 113 S.Ct. at 2796. Although *Daubert* involved Rule 702 and scientific evidence, the flexibility of the federal rules also applies to Rule 703 and the determination of the trustworthiness of the sources of expert testimony. The district court has broad discretion to decide the admissibility of expert testimony based on inadmissible evidence.

We decline, however, to shackle the district court with a mandatory and explicit trustworthiness analysis. The district judge, who has the ideal vantage point to evaluate an expert's testimony during trial, already has the authority under Fed.R.Evid. 403 to conduct an explicit trustworthiness analysis should she deem one necessary. *See Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 208 (2d Cir.1984) (noting that the district court has the "discretionary right under Rule 703 to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony"). In fact, we assume that the district court consistently and continually performed a trustworthiness analysis *sub silentio* of all evidence introduced at trial. We will not, however, circumscribe this discretion by burdening the court with the necessity of making an explicit determination for all expert testimony. This is especially true in this case, because the sources relied upon by Schiliro are no different from those previously allowed by this Court. *See Daly*, 842 F.2d at 1387-88.

4. *Availability of Alternative Methods of Proof*

[18] Finally, the defendants-appellants argue that because an accomplice witness was available to provide similar testimony concerning the operations of organized crime families, the government was not permitted to introduce

expert testimony on the subject. Rule 702, however, requires only that an expert have "some specialized knowledge that will assist the trier of fact." There is no requirement that prohibits a government agent from testifying as an expert merely because an accomplice witness is also available.

The defendants-appellants mistakenly rely upon *United States v. Long*, 917 F.2d 691 (2d Cir.1990), and *United States v. Castillo*, 924 F.2d 1227 (2d Cir.1991), to support their contention. In *Long*, we held that the district court abused its discretion by admitting expert testimony regarding organized crime, but only because the crimes alleged had merely a marginal connection to organized crime. 917 F.2d at 701 – 02. The present case is readily distinguishable in that the charges against the defendants-appellants are intimately related to organized crime.

Similarly, in *Castillo*, this Court held that expert testimony had been erroneously admitted not because a lay witness could have provided the same testimony, but because we concluded that the jury "was entirely capable of understanding the evidence before it and determining the facts in issue without [the expert's] assistance." 924 F.2d at 1233. The same cannot be said about this case.

5. *Other Challenges*

The defendants-appellants challenge the introduction of testimony from two other sources: FBI Agents George Mueller and George Gabriel. The record reflects, however, that neither of these witnesses testified as experts, and that neither defendant-appellant objected to their testimony when it was given. Therefore, we find no reason to disturb the district court's admission of their testimony.

C. *Conclusion*

[19] Although we recognize the dangers inherent in the use of government experts in cases such as this one, we hold

that the admission of such testimony was not manifestly erroneous. We remind the district courts, however, that they are not required to admit such testimony, and when they do the testimony should be carefully circumscribed to ensure that the expert does not usurp either the role of the judge in instructing on the law, or the role of the jury in applying the law to the facts before it. *Cf. United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 63, 116 L.Ed.2d 39 (1991).

III. *Jury Instructions*

[20] Gotti and Locascio make various challenges to the district court's instructions to the jury. We review those instructions *de novo*, and will only reverse on this basis if the defendants-appellants can show that the charge given, when read as a whole, caused them prejudice. *See United States v. Pujana-Mena*, 949 F.2d 24, 27 (2d Cir.1991).

A. *Section 1959*

[21] Gotti argues that the district court erroneously instructed the jury on the murder and murder conspiracy counts. These charges were founded on 18 U.S.C. § 1959, which provides:

> (a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or *maintaining or increasing position* in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished . . . .

18 U.S.C. § 1959(a) (emphasis added). The "maintaining or increasing" requirement is given its ordinary meaning and is "satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir.1992).

Gotti argues, however, that the district court's instructions on the § 1959 counts were ambiguous, allowing him to be convicted even if the jury found that the murders were committed to advance someone else's position, not his own. Gotti's theory of defense was that many of the murders commited by Gambino Family associates were actually authorized by Gravano, the government witness, solely for his own purposes. Gotti argued to the jury that Gravano had orchestrated the murders to improve his own financial position, and that Gotti had nothing to do with them.

Gotti and Locascio focus on two parts of the instructions: (1) the court's language at the end of its instructions on the counts charging substantive violations of § 1959; and (2) the court's charge on the § 1959 conspiracy counts. For the reasons stated below, we find no basis for reversal, even though we recognize that the district court should have more clearly stated and reiterated the "maintaining or increasing position" motive requirement of § 1959 in both the substantive and conspiracy counts.

(1) *Language in the Substantive § 1959 Counts*

A review of the instruction reveals that the district court initially clearly instructed the jury that the government had to prove that Gotti and Locascio committed the murders in order to maintain or increase their respective positions in the enterprise. Referring to substantive counts four, six, and eight, the court specifically charged that

> the fourth element that the Government must prove beyond a reasonable doubt is that the defendant's purpose in committing the murder was to maintain or increase his position in the racketeering enterprise. In determining whether a defendant's purpose in committing the murder was to maintain or increase his position in that enterprise, you should give the words "maintain" or "increase" their ordinary meaning. You should consider all the facts and circumstances in making that determination.
>
> For example, you may consider evidence that the crime, if proved, was committed in order to maintain discipline within the enterprise and served to maintian the defendant's position with the enterprise.
>
> If the defendant committed a crime because he thought it would enhance his position or prestige within the enterprise, or if he committed it because he thought it was necessary to maintain the position he already held in the enterprise, the element would be established.
>
> These examples are only meant by way of illustration. They are not exhaustive.

These instructions are entirely consistent with the language in *Concepcion. See id.*

The district court's initial instructions on the substantive § 1959 counts, then, correctly reflected the government's burden to show that Gotti and Locascio acted to increase or maintain their respective positions in the enterprise. As the instructions continued, however, the district court unfortunately began to use a short-hand phrase to refer to the § 1959 motive requirement.

Toward the end of its instructions on the substantive § 1959 counts, the court summarized its § 1959 instructions without mentioning the maintaining-or-increasing-his-posi-

tion motive and using instead the short-hand phrase "in aid of racketeering." The court said. "[i]n short," that the jury should convict on the substantive § 1959 count in question if it found that the government proved beyond a reasonable doubt that the defendant the jury was considering committed the crime of murder or aided or abetted the commission of that crime "in aid of racketeering." Since virtually all crimes could be committed "in aid of recketeering" without the motive of maintaining or increasing the perpetrator's position in the enterprise, this summary was unfortunately vague. Though the phraseology may be cumbersome, the district court should remind the jury of the position-related motivation requirement that is applicable to each § 1959 count.

Gotti and Locascio argue that the charge was fatally flawed because of the use of the "in aid of racketeering" language. The district court, however, only used the ambiguous short-hand language in the summary of the instruction, after having articulated the requirement correctly throughout the rest of the explanation of the counts. Moreover, the court gave the jurors the indictment, which alleged that Gotti and in some cases Locascio "together with others" conspired to murder and/or murdered four individuals "for the purpose of maintaining and increasing their positions in the Gambino Family." At the point when the district court lapsed into short-hand, the jury was already well aware of the motive requirement.

(2) *Language on the § 1959 Conspiracy Counts*

[22] In the district court's instructions on the § 1959 conspiracy counts, the court again used language that blurred the § 1959 motive requirement. As with the substantive counts, the court began by informing the jury of the charge in the indictment and of the statutory provision, both

of which include the "maintaining or increasing position" clause.

In proceeding to instruct the jury as to what it needed to find in order to convict on these counts, though, the court again used its "in aid of racketeering" catch phrase. The court did not at that point expressly advise the jury that, in order to convict on the § 1959 conspiracy counts, the jury was required to find that the defendant in question conspired to commit murder for the purpose of maintaining or increasing his position in the enterprise.

At another point, when instructing the jury as to the nature of the alleged conspiracy, the court often used a short-hand phrase with respect to the object of the conspiracy that did not adequately reflect the need for proof of a position-related purpose. For example, the court instructed that a "conspiracy is defined very simply as an agreement between two or more persons to commit a crime" and that

> [i]t is enough if the Government proved two or more persons, one of whom being the defendant you are considering in any way, either expressly or impliedly, came to a common understanding *to commit a crime to violate the law* . . . .

(emphasis added). The court also concluded using the short-hand:

> Summing up then, the essential elements of the offense charged in counts three, five, seven and nine, conspiracy to murder *in aid of racketeering,* each of which the Government must prove beyond a reasonable doubt are:
>
> First, that [a] conspiracy existed. That is two or more people, one of whom is the defendant that you are considering, *agreed to violate federal law against murder in aid of racketeering.*

> And second, that the defendant knowingly and willfully became a member of the conspiracy.
>
> . . . .
>
> The burden is on the Government to prove each and every element. There are two, the existence of the conspiracy and the defendant's membership in it, beyond a reasonable doubt.

(emphasis added). These instructions arguably left the potential for the jury to misunderstand the nature of the § 1959 conspiracy charges against Gotti and Locascio. It should be noted, though, that these lapses came after the district court had already properly instructed the jury on the position-related motive requirement of § 1959. The jury did receive accurate instructions initially, although the district court proceeded to refer back to the motive requirement with the short-hand "in aid of racketeering" catch-phrase rather than the more precise "increase or maintain" language.

(3) *Conclusion*

[23] Gotti and Locascio argue that the vagueness in the instructions, caused by the district court's lapses into short-hand, constitutes reversible error. We note, though, that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). We disagree that the district court's charge was erroneous, because, even with the lapses, the instruction as a whole accurately charged the jury, especially considering that the court did properly impart the motive requirement numerous times and did give the jury the indictment, which also used the "increase or maintain" language.

[24] Even if the district court had committed error in its instructions, however, the defendants failed to object to these aspects of the instructions at trial. Federal Rule of Criminal Procedure 30 provides that "[n]o party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." While defendants' own requested instructions contained the requisite position-related-purpose statements, a defendant's "requested instructions do not substitute for specific objections to the court's instructions." *United States v. Tannenbaum*, 934 F.2d 8, 14 (2d Cir.1991) (quoting *United States v. Graziano*, 710 F.2d 691, 696 n. 8 (11th Cir.1983), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984)). Although a "plain" error or defect affecting substantial rights of a party may warrant reversal of the conviction even though no objection was made in the trial court, *see* Fed.R.Crim.P. 52(b), the plain error standard warrants reversal "solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Frady*, 456 U.S. 152, 163 n. 14 102 S.Ct. 1584, 1592 n. 14, 71 L.Ed.2d 816 (1982) *see United States v. Wilkinson*, 754 F.2d 1427, 1432 (2d Cir.), *cert. denied*, 472 U.S. 1019, 105 S.Ct. 3482, 87 L.Ed.2d 617 (1985).

[25, 26] Thus, even if we considered the instructions error, the failure of the defendants to object requires that we only examine the instruction for a miscarriage of justice. In light of the facts (a) that at the outset of its § 1959 instructions the district court properly instructed the jury as to the need to find a position-related motive, (b) that the jury was given a copy of the indictment, which correctly stated the motive requirement, (c) that the court advised the jury that it must determine whether or not the government has proven the conspiracy "as it is alleged in the indictment," and (d) that there was overwhelming evidence in the record to

support a finding of such a motive, we cannot conclude that the court's short-hand summaries resulted in such a miscarriage of justice. A review of the charge in its entirety shows that the jury was well aware that it had to find that Gotti and Locascio were acting to advance their own positions within the criminal enterprise. The jury was free to accept Gotti's defense that the murders had been planned and committed only to further Gravano's interests, and simply rejected that theory.

We note, however, that it would have been preferable had the district court consistently reminded the jury that the motivation requirement applied to each § 1959 count.

B. *The RICO "Pattern" Element*

[27] Gotti also challenges the district court's instruction concerning the RICO pattern element. *See* 18 U.S.C. § 1962(c). The RICO pattern element requires that defendants commit at least two acts of racketeering that: (1) are related, and (2) amount to or pose a threat of continued criminal activity *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239, 109 S.Ct. 2893, 200, 106 L.Ed.2d 195 (1989). Gotti principally contends that the district court erred in instructing the jury on the relatedness requirement of the statute.

In describing the relatedness requirement, the district court instructed the jury as follows:

> Before you can find a pattern of racketeering activity, you would have to find that the Government proved beyond a reasonable doubt that the two racketeering acts were interrelated, that is, that they were related to each other as well as related to the enterprise and that they posed a threat of continuing criminal activity.

> Two racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise.
>
> The relationship between the RICO enterprise and the predicate racketeering acts may be established by evidence that the defendant you are considering was enabled to commit the racketeering acts solely by virtue of his position in the enterprise or involvement in or control over its affairs or by evidence that the predicate racketeering acts are related to the activities of that enterprise.

Gotti argues that the district court should have instructed the jury that it could not find the defendants guilty if it found that the racketeering acts charged in the indictment were committed exclusively for the individual's own purpose, not to further the goals of the Gambino Family. He points out that other circuits require that the racketeering acts further the affairs of the enterprise, not just relate to the enterprise. *See, e.g., United States v. Erwin*, 793 F.2d 656, 671 (5th Cir.), *cert. denied*, 479 U.S. 991, 107 S.Ct. 589, 93 L.Ed.2d 590 (1986); *Bank of America National Trust & Savings Association v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986).

Gotti admits, however, that this Court does not impose such an "in the furtherance of" requirement. Rather, we have held that the relatedness requirement can be satisfied by proof that: (1) the defendant was enabled to commit the offense solely by virtue of his position in the enterprise; or (2) the offense was related to the activities of the enterprise. *See United States v. Robilotto*, 828 F.2d 940, 947-48 (2d Cir.1987), *cert. denied*, 484 U.S. 1011, 108 S.Ct. 711, 98 L.Ed.2d 662 (1988); *United States v. LeRoy*, 687 F.2d 610, 617 (2d Cir.1982), *cert. denied*, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983). Thus, under the law of this circuit, it is not determinative that the defendant com-

mitted the crime to further his own agenda, if indeed he was only able to commit the crime by virtue of his position within the enterprise. The district court instructed the jury accordingly.

[28] Gotti also argues that the district court erred in instructing on relatedness by failing to state that the predicate racketeering acts must be related both to each other and to the enterprise. Again, however, that is not the law of this Circuit. We have held that the relatedness requirement is satisfied even if the predicate acts are not *directly* related to each other so long as both are related to the RICO enterprise in such a way that they become *indirectly* connected to each other. *See United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1511, 117 L.Ed.2d 648 (1992); *United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir.1989) (in banc). The district court instructed accordingly.

IV. *Locascio's "Mere Presence" Arguments*

Locascio was convicted for crimes stemming from his role as the "underboss" of the Gambino Crime Family. The government established at trial that Locascio's function as underboss was to advise Gotti in the formulation of plans for the Gambino Family's criminal activities. His conviction was principally grounded on his presence in the Ravenite Apartment during discussions about the crimes for which he was convicted, even though he did not personally discuss many of those crimes. The government's theory was that only involved members of the conspiracy would have been allowed to attend these Ravenite Apartment meetings. Moreover, the government argued that Losascio's role as an advisor mandated that he not speak up at such meetings, unless it was to assist Gotti.

Locascio now argues that his culpability was presumed by his "mere presence" in the Ravenite Apartment and his

mere exposure to conversations in which criminal conduct was discussed. Locascio contends that he was convicted not for his conduct but for his alleged position in the charged enterprise, which he argues essentially made him absolutely liable for anything that occurred. Therefore, he challenges both the sufficiency of the evidence against him and the district court's instruction that his "functional presence" in the Ravenite Apartment during discussions was sufficient to prove his participation in the various conspiracies.

A. *Sufficiency of the Evidence*

[29, 30] Locascio's challenge to the sufficiency of the evidence carries, as we have often stated, a heavy burden. In reviewing such challenges, we view the evidence in the light most favorable to the government and credit every inference in its favor. *See United States v. Skowronski*, 968 F.2d 242, 247 (2d Cir.1992). Moreover, we will affirm the conviction if any jury could have found guilt beyond a reasonable doubt based on the reasonably drawn inferences from that evidence. *See id.* ("Any challenge to the weight of the evidence is for argument to the jury, not a ground for reversal on appeal."); *see also Concepcion*, 983 F.2d at 382.

[31] Locascio argues that the only proof of his participation in the conspiracy was that he was present in the Ravenite apartment when some of the actions were discussed. Locascio asserts that his mere presence is not enough to prove participation. *See United States v. Scarpa*, 913 F.2d 993, 1004 (2d Cir.1990) ("[K]nowledge of the existence and goals of a conspiracy does not of itself make one a co-conspirator.")

Traditionally, conspiracy law has required more than "mere presence" or mere knowledge to sustain a conviction for conspiracy. *See, e.g., United States v. Edwardo Franco*, 885 F.2d 1002, 1010-11 (2d Cir.1989) (holding that defendant who lived for twelve days in a single room of a house

found to contain drugs in basement could not be convicted of conspiracy to possess for mere presence in house); *United States v. Nusraty*, 867 F.2d 759, 764-65 (2d Cir.1989) (holding that mere presence at airport when acquaintance arrived carrying drugs could not justify conspiracy conviction); *United States v. Soto*, 716 F.2d 989, 991 (2d Cir.1983) (holding that defendant's presence in apartment in which drugs were found did not sufficiently support conviction). Rather, it is necessary for the government to introduce some evidence of participation in the conspiracy in order to sustain a conviction. *See id.*

[32] Locascio, however, was not convicted for his mere presence. There is a distinction between "mere presence" and "presence under a particular set of circumstances" that indicate participation. *See United States v. Gordils*, 982 F.2d 64, 71 (2d Cir.1991), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1953, 123 L.Ed.2d 657 (1993); *United States v. Soto*, 959 F.2d 1181, 1185 (2d Cir.1992). The distinction is that, although one's presence in a setting where a conspiracy is being conducted or discussed may not by itself connote, participation, presence coupled with extrinsic factors can support such a finding. The cicumstances under which one is present may imply involvement.

The distinction between "mere presence" and "presence under a particular set of circumstances" is illustrated by a comparison of the two *United States v. Soto* cases, which involve two separate litigants and were decided nine years apart. Locascio cites the first *Soto* opinion, in which we reversed a conviction for a woman charged with a conspiracy to distribute narcotics. *See Soto*, 716 F.2d at 990. In that case, there was no evidence other than her presence in an apartment in which drugs were found to prove her involvement in the conspiracy. The defendant's circumstances, however, were unique:

> While it would not be accurate to characterize Soto's presence at the apartment as merely transitory, we nevertheless consider the total circumstances of how Soto came to reside there to be highly significant. For here we have an individual newly arrived from Puerto Rico, accompanied by a child of tender years, clearly in need of shelter. To this end, as soon as she arrived in New York defendant took up residence at the ... apartment. Although the living arrangements there may not have been ideal, there is no indication that defendant had any other alternative.

Id. at 901.

In contrast, the second *Soto* case involved a man who similarly argued that the facts only indicated that he was merely present in the apartment in which drugs and guns were found. *See Soto*, 959 F.2d at 1185. The Court noted that there was more than mere presence in that case, in that the facts indicated that the defendant was working at a crack packaging station, and that:

> [t]he jury could also have reasonably determined that only trusted members of the operation would be permitted entry into the apartment, because allowing outsiders to have access to an apartment with large quantities of narcotics in plain view could compromise the security of the operation.

Id.

In the first *Soto* case, it was the lack of corroborating evidence, the fact that there was nothing other than her presence, that formed the basis for the Court's opinion. In contrast, the second *Soto* opinion demonstrates that presence coupled with other signs of involvement will be enough to sustain a conviction.

In this case, the evidence viewed in the light most favorable to the government indicates that, as the "underboss," Locascio was present to help evaluate plans presented to Gotti and give advice as needed. Gotti, Locascio, and Gravano took extensive but ultimately unsuccessful precautions to ensure that their conversations in the Ravenite Apartment, the conversations constituting the bulk of the evidence against them, were not overheard. Considering the precautions taken to ensure security, and after hearing the tapes of what was discussed in that apartment, the jury was entitled to consider whether it was likely that Locascio would have been present during those conversations if he were not a participant. Although Locascio's mere presence would not be sufficient to sustain his conviction, the government did far more than establish mere presence.

B. *Jury Instruction*

[33] Locascio argues that the district court improperly instructed the jury on conspiratorial liability. The instruction reads as follows:

> Now, although mere presence or mere association with conspirators is not enough, it's a factor that you may consider among others to determine whether a defendant was a member of the conspiracy. The defendant's presence may establish his membership in a conspiracy, if all of the circumstances considered together show that his presence was meant to advance the goals of that conspiracy.
>
> He must not only have been present, he must have known about the conspiracy, he must have intended by his presence to participate in the conspiracy or to help it succeed.
>
> In other words, presence itself may demonstrate membership in a conspiracy only if that presence is a functional part of the conspiracy.

Locascio contends that this instruction improperly allowed the jury to convict him for his "mere presence." Considering the above discussion, however, it is clear that the district court quite properly instructed the jury that presence under circumstances that advance the purposes of the conspiracy would be sufficient to support a finding of guilt.

V. *Prosecutorial Misconduct*

[34, 35] Gotti and Locascio argue that they are entitled to a new trial based on various remarks made by the government during the course of trial, remarks which they contend constitute prosecutorial misconduct. In asserting this claim, the defendants-appellants face a heavy burden, because the misconduct alleged must be so severe and significant as to result in the denial of their right to a fair trial. *See Bissett v. Lefeure*, 924 F.2d 434, 440 (2d Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 158, 116 L.Ed.2d 123 (1991). In evaluating such a claim, we consider: (1) the severity of the alleged misconduct; (2) the curative measures taken; and (3) the likelihood of conviction absent any misconduct. *See id.*

[36] Gotti and Locascio have raised numerous allegations of prosecutorial misconduct, most of which are not worthy of lengthy discussion. There is one instance, however, that merits some consideration. The United States Attorney for the Eastern District of New York at the time of the trial gave a rebuttal summation in which he made the following statement:

> Let me conclude with this. I want to talk about this briefly. I may be insulting some of you. I hope I'm not.
>
> If you accept the proof of what you are dealing with here, the boss of a murderous and treacherous crime family and his underboss, you would be less than human, if you didn't feel some personal concern —

The prosecutor was at that point interrupted by an objection, which was properly sustained by the district court.

There is no question that the remark was totally inappropriate, an intolerable attempt by the prosecution to instill fear of the defendants. The government now attempts to justify the remark by arguing that "it was made in the good faith belief in its propriety." The government cites to *United States v. Scarfo*, 850 F.2d 1015, 1024-26 (3d Cir.), *cert. denied*, 488 U.S. 910, 109 S.Ct. 263, 102 L.Ed.2d 251 (1988), to support its proposition that a statement addressing jurors' concerns for their personal safety is proper. In *Scarfo*, however, the Third Circuit merely affirmed a statement by the district court to the jury prior to trial addressing the reasons for sequestration, in order to dispel unnecessary and possibly prejudicial speculation.

There is a world of difference between a district court instructing the jurors that they should not be concerned for their personal safety, and a United States Attorney, in summation, telling the jurors that they would be "less than human" if they "didn't feel some personal concern." It is simply not the duty of the prosecutor to address the jury's potential security anxieties. Should the prosecutor — or, for that matter, the defense attorney — become concerned that a juror is unduly concerned for personal safety, she can raise the issue before the district court. It is up to the judge to decide whether reassurance is needed.

The government also asserts in defense of the remark that statements made by a prosecutor in the course of trial must be evaluated in the context in which they are made. *United States v. Casamento*, 887 F.2d 1141, 1189 (2d Cir.1989), *cert. denied*, 493 U.S. 1081, 110 S.Ct. 1138, 107 L.Ed.2d 1043 (1990). There is, however, no context in which a reference of this type is proper. Such remarks do much more to raise juror fears than quell them.

[37] There is no question, then, that the remark at issue was indefensible. The only inquiry is whether it constitutes prosecutorial misconduct requiring reversal. We hold that reversal is not warranted. Although the statement potentially caused jurors to question their own safety, the fact that the district court immediately struck the remark mitigates the possible prejudice. *See id.* The transcript shows that the prosecutor immediately moved on to other areas, and it is likely that the jury did not even take notice of the intent and meaning of the safety reference. Most importantly, in view of all the evidence in this case, the likehood that the remark had anything to do with the convictions is nonexistent. As noted earlier, the jurors did not robotically vote to convict the defendants on all charges, acquitting Locascio on one count. This indicates that the jury does not appear to have been influenced to deviate from its sworn duties. The conduct, therefore, was harmless.

VI. *Sequestration*

[38] Gotti argues that the sequestration of an anonymous jury denied him and Locascio a fair trial because of the district court's failure to adequately state the reasons for sequestration, and because of the prosecution's inflammatory use of the sequestration to influence the jury against Gotti.

In *United States v. Thomas*, 757 F.2d. 1359, 1362-65 (2d Cir.), *cert. denied*, 474 U.S. 819, 106 S.Ct. 66, 88 L.Ed.2d 54 (1985), we approved the sequestration of an anonymous jury where the district court explained to the jurors that protective measures were necessary because of "considerable publicity" the case had generated among the "media and the public." *Id.* at 1365 & n.1. We found that the explanation was "an intelligent, reasonable and believable explanation for his actions that did not cast defendants in an unfavorable light." *Id.* at 1364.

The district court in the instant case acted similarly, explaining to the jury that protective measures were needed because of undue publicity. The court did not tell the jury that those measures were needed to protect jurors from possible tampering by the Gambino Family. The district court did, however, explain to the defendants-appellants and the government that an additional reason for sequestration was the potential for tampering, specifically relying upon the government's evidence of previous instances of jury tampering by Gotti and his associates.

[39] Gotti also contends that the prosecutor inflamed the jury against him by implying the real reasons for the security measures. In particular, Gotti cites: (1) the prosecutor's references to the jurors' oath to render a verdict "without fear or favor"; (2) the presence of FBI agents and United States Marshals in the courtroom; and (3) evidence introduced at trial about the Gambino Family's jury tampering and witness intimidation. Each of these actions, however, was justified; the prosecutor was simply reminding jurors of their oath; the presence of federal agents was necessary to ensure safety in the courtroom; and, finally, the evidence about jury tampering was admitted to prove the charges in the indictment, and was properly admissible for that purpose. None of these claims supports the argument that sequestration was in error.

VII. *Severance*

[40] Shortly before the start of trial, Locascio made a motion for severance to separate his trial from Gotti's. This motion was denied. Locascio made a second motion toward the end of trial, which was also denied. He now argues that the denial of these motions was error, and that he was unable to receive a fair trial as a co-defendant of Gotti's.

[41] A motion for severance is committed to the sound discretion of the district court, and its disposition is virtually

unreviewable on appeal. *See United States v. Lasanta*, 978 F.2d 1300, 1306 (2d Cir.1992). Locascio makes three different claims supporting his argument for severance: (1) the size of the case alone, and his relatively minor role; (2) "disparity of proof prejudice," based on the argument that the proof against Gotti was overwhelming while the proof against Locascio was marginal; and (3) "spillover prejudice," based on the volume of evidence introduced solely against Gotti and not against Locascio.

None of these arguments has merit. We have never recognized the need for severance based on the size of the trial. Even if we did, this case only involves two defendants, and Locascio was charged in eight of thirteen counts. As for the second argument, the disparity of proof prejudice, this Court has repeatedly recognized that joint trials involving defendants who are only marginally involved alongside those heavily involved are constitutionally permissible. *See, e.g., United States v. Scarpa*, 913 F.2d 993, 1014-15 (2d Cir.1990); *United States v. Cervone*, 907 F.2d 332, 341-42 (2d Cir.1990), *cert. denied*, 498 U.S. 1028, 111 S.Ct. 680, 112 L.Ed.2d 672 (1991). Again, Locascio was not a minor participant, and the majority of the counts involved him.

[42] Finally, although this Court recognizes that "spillover prejudice" can require severance, the appellant alleging such prejudice bears a heavy burden. To succeed, Locascio must show that the spillover constituted a miscarriage of justice. *See Lasanta*, 978 F.2d at 1306. Locascio cannot meet that burden. The district court was careful to remind the jury to consider only evidence against Locascio in making its determination, and Locascio does not identify any evidence introduced that would have been inadmissible at a severed trial. Moreover, Locascio was acquitted of one charge, which indicates that the jury heeded the instructions

from the district court and did not merely vote wholesale on all the charges.

VIII. *Other Challenges*

Gotti and Locascio make numerous other challenges to their convictions. These include arguments that the district court improperly admitted evidence prejudicial to Gotti of other murders committed by Gravano, arguments concerning the government's failure to fulfill its disclosure obligations, and Locascio's challenge to the district court's denial of Locascio's requests for a bill of particulars. We find these and the other challenges made to the disposition of the trial to be without merit and unworthy of further discussion.

IX. *The New Trial Motion*

[43] Gotti and Locascio argue that they are entitled to a new trial based on information casting doubt on Gravano's credibility disclosed to them after the original trial.

A. *Background*

Several months after Gotti and Locascio were sentenced, one of the prosecutors, preparing for a different trial, was reviewing reports of information obtained from Alphonse D'Arco, a government witness in another trial ("D'Arco report"). The D'Arco report had been prepared by government agents who were not involved in the instant case, and included allegations about Gravano. At the same time, the United States Attorney for the Eastern District of New York received from a prosecutor in another district an FBI report made in 1987 that also contained allegations about Gravano ("FBI report"). The FBI report had similarly been prepared by agents uninvolved in the investigation or trial of the defendants-appellants. Neither of these reports had been disclosed to the defense prior to the instant trial.

The D'Arco report included three separate uncorroborated allegations by D'Arco: (1) that Gravano had been responsible for the murder of Eddie Lino, a Gambino Family soldier; (2) that Gravano had "gotten to" (i.e., murdered) the prospective son-in-law of Nicky Corazzo; and (3) that Gravano had killed an individual named "Harold," who owned an establishment known as the Adventurer's Inn, because of a financial dispute.

The FBI report contained allegations made by an inmate at a federal prison. The inmate alleged that he had been told by another inmate, who had been told by yet another source, that an individual named either Salvatore Gravano or Gravatto had aided in the disposal of the body of Pietro Inzerillo.

Gravano, in his plea bargain, had not confessed to any of these crimes, even though his plea bargain stated that he had admitted all the crimes with which he was involved. He also testified at trial that he had only committed the crimes referred to in his plea bargain.

The government states that, upon receiving these reports, prosecutors asked Gravano if he had in fact committed any of the alleged crimes. Gravano denied involvement in them. The government then confirmed that no member of the prosecution team is the instant trial had been aware of either the reports or the allegations, and disclosed the allegations, to defense counsel.

On October 22, 1992, six months after trial was completed, while their appeal was pending before this Court, Gotti and Locascio filed a motion in this Court to remand the appeal of their convictions in order to allow the district court to pass on a motion for a new trial pursuant to Fed.R.Crim.P. 33. The parties agreed that the district court would treat the new trial motion as filed in the district court. Gotti and Locascio raised two arguments: (1) that the two

undisclosed reports demonstrated that the defendants-appellants had been convicted on the basis of Gravano's perjured testimony, since he had testified that he had committed no crimes except those admitted in his plea bargain; and (2) that the government had violated its discovery obligations by failing to disclose the allegations to the appellants.

The district court denied the motion for a new trial without an evidentiary hearing, finding that the information in the reports was untrustworthy and unsubstantiated, and that the government's failure to disclose the allegations to defense counsel did not violate the requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, the court ruled that the information was neither known to the prosecutorial team nor exculpatory in nature, and stated that the information did not

> in any way tend to exonerate or exculpate either Gotti or Locascio of the crimes of which they were convicted. There is no dispute that at best, those reports would have provided trial counsel with an opportunity to cross examine Gravano about two more murders.

Following the district court's decision, the defendants-appellants obtained materials disclosed to the defense in another case. The information tended to bring into question the government's representation that no one on the trial team was aware of the D'Arco allegations against Gravano. The district court considered this information in a renewed motion for a new trial and without a hearing reaffirmed its earlier decision, relying on affidavits submitted by prosecutors denying that they had awareness of the allegations against Gravano.

Gotti and Locascio now appeal, arguing that the information: (1) indicates that Gravano perjured himself; and (2) should have been disclosed under *Brady* so that they

could impeach Gravano, requiring a new trial. We note that Gotti and Locascio have raised in reply briefs yet another allegation of non-disclosed material, although this allegation was never heard by the district court.

B. *Discussion*

[44, 45] Federal Rule of Criminal Procedure 33 authorizes a district court to grant a new trial "if required in the interest of justice." Such authority is only exercised, however, in the most extraordinary circumstances. *See United States v. Imran*, 964 F.2d 1313, 1318 (2d Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 626, 121 L.Ed.2d 558 (1992). A district court learning of newly discovered evidence after a conviction will only grant a new trial pursuant to Rule 33 if the evidence is material, noncumulative, and "would probably lead to an acquittal." *United States v. Gilbert*, 668 F.2d 94, 96 (2d Cir.1981), *cert. denied*, 456 U.S. 946, 102 S.Ct. 2014, 72 L.Ed.2d 469 (1982); *see United States v. Siddiqi*, 959 F.2d 1167, 1173 (2d Cir.1992). We will not disturb the district court's findings of fact in these matters unless clearly erroneous, and we will not overturn the district court's decision except for an abuse of discretion. *See United States v. Gordils*, 982 F.2d 64, 72 (2d Cir.1992)), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1953, 123 L.Ed.2d 657 (1993).

There was no such abuse of discretion here. Gotti and Locascio argue that the newly discovered reports concerning Gravano would have made a difference at trial, and that the government has a *Brady* obligation to disclose them. However, as the district court found, these reports would have had no effect on Gravano's credibility, not only because they were untrustworthy, but also because they would merely have been cumulative. *See id.* (holding that new evidence impeaching key government witness's credibility did not require new trial because it was cumulative of evidence already introduced); *United States v. Gilbert*, 668 F.2d 94,

96 (2d Cir.1981) (same), *cert. denied*, 456 U.S. 946, 102 S.Ct. 2014, 72 L.Ed.2d 469 (1982). Gravano had already confessed to numerous crimes, including murders, and was subject to withering cross examination for those actions. The addition of a few more allegations would not have materially affected the defense's cross examination of him.

Gotti and Locascio still maintain that, even if the evidence was cumulative, its suppression by the government requires a new trial. *See Brady*, 373 U.S. 83, 83 S.Ct. 1194; *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir.1975) (permitting new trials where the prosecutor suppressed or failed to disclose evidence), *cert. denied*, 429 U.S. 819, 97 S.Ct. 65, 50 L.Ed.2d 80 (1976). As the district court found, though, there was no suppression by the government. Even assuming the reports' materiality, there is no evidence that the prosecution team in the instant case was aware of the reports that have subsequently come to light. We will not infer the prosecutor's knowledge simply because some other government agents knew about the report. *See Morgan v. Salamack*, 735 F.2d 354, 358 (2d Cir.1984); *United States v. Quinn*, 445 F.2d 940, 944 (2d Cir.) (holding that knowledge on the part of one arm of government does not imply knowledge by the prosecutor), *cert. denied*, 404 U.S. 850, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971). Moreover, the *Brady* argument defies logic. There would be no reason for the prosecution to withhold evidence of three or four more murders, considering that the jury had already heard evidence of 19 other murders committed by Gravano.

For these reasons, we hold that the district court did not abuse its discretion in denying the motion for a new trial and the renewed motion for a new trial. We will not consider the other allegations of non-disclosure made by Gotti and Locascio, for failure to raise those issues before the district court and make those allegations part of the record. *See United States v. Clements*, 992 F.2d 417, 420 n. 4

(2d Cir.1993). The defendants-appellants are therefore free to pursue the issue through whatever post-conviction remedies they may still have available to them. *See United States v. Bianco*, 998 F.2d 1112, 1115 (2d Cir. 1993).

CONCLUSION

Having considering all of the defendants-appellants' contentions, we affirm the judgment of the district court.

KEARSE, Circuit Judge, concurring:

I concur in the judgment and in most of the majority opinion. I disagree, however, with the majority's treatment of the trial court's instructions on the counts charging violations of 18 U.S.C. § 1959 (1988).

With respect to the counts charging substantive violations of § 1959, the trial court began by instructing the jury properly that it could not find a defendant guilty unless it found that he had committed the alleged murder "for the purpose of . . . maintaining or increasing position" in the racketeering enterprise. As the majority recognizes, however, toward the end of this part of the instructions, the trial court began using a shorthand phrase, i.e., murder "in aid of racketeering," which omitted reference to the position-related-purpose element of the offense. This omission also characterized the trial court's instructions on the counts charging conspiracy violations of § 1959.

In addition, the instructions on the § 1959 conspiracy charges, quoted in the majority opinion, contained a second flaw not discussed by the majority. In advising the jury that it was "enough" if the government proved that defendants agreed "to commit a crime to violate the law," for example, the court not only obscured § 1959's position-related-purpose requirement but also opened the door to verdicts of guilty on the basis that the defendants conspired merely to violate § 1959 or some other federal law, without having conspired to commit murder in order to maintain or increase their respective positions in the racketeering enterprise. To be sure, a conspiracy to violate § 1959 or any other federal statute would in itself be a crime, for it would violate 18 U.S.C. § 371 (1988), which prohibits conspiracy to commit

an offense against the United States. A person may be guilty of conspiring to violate a given substantive section, however, without having performed all of the acts needed, or without possessing the motive needed, to consummate a violation of that section. For example, a conspiracy *to violate* § 1959 could encompass a conspiracy in which defendant X agreed to murder Y with the goal of assisting Z to improve Z's position in the racketeering enterprise. Though that conspiracy, assuming commission of an overt act in furtherance, would violate § 371, it would not be a conspiracy *in violation of* § 1959 as alleged in the present case, unless X was a member of the enterprise and also had the purpose of improving or increasing his own position in the enterprise. The indictment in this case did not charge a violation of § 371, and the quoted parts of the court's instructions were an inaccurate statement of what, the jury needed to find in order to convict, defendants of the alleged conspiracy in violation of § 1959. Advising the jury that one of the two essential elements of the § 1959 conspiracy offense was "conspiracy to murder in aid of racketeering" (the other element being that the defendant knowingly joined the conspiracy) and that it was "enough" if defendants had agreed to "to commit a crime to violate the law," did not inform the jury that, in order to convict under § 1959, it must find that defendants had conspired to commit murder in order to maintain or increase their respective positions in the enterprise.

I concur in the judgment affirming the convictions, however, because defendants did not object to the erroneous parts of the trial court's instructions. Had they done so, the court would have had an opportunity to make, and no doubt would have made, the appropriate corrections. If defendants had objected and the trial court had refused to give corrected instructions, I would think the error a ground for reversal. In the absence of objection, however, and in light of the initial correctness of the instructions and the ample

sufficiency of the evidence as to the position-related-purpose element, I do not conclude that the court's erroneous shorthand summaries constituted plain error or resulted in a miscarriage of justice. Accordingly, I concur in the judgment.

APPENDIX B

DOCKET NUMBER: 92-1382L

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of December one thousand nine hundred and ninety-three.

UNITED STATES OF AMERICA,
Appellee,

VS.

FRANK LOCASCIO AND JOHN GOTTI,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant JOHN GOTTI.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk

By: _____
Carolyn Clark Campbell
Chief Deputy Clerk

FILED
APR 11 1994
OFFICE OF THE CLERK

No. 93-1400 and 93-1420

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN GOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK LOCASCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury was properly instructed on the "pattern of racketeering" element of RICO.

2. Whether a single, promptly stricken remark in the prosecutor's closing argument required reversal of the convictions.

3. Whether the district court committed plain error in instructing the jury under 18 U.S.C. 1959(a) on the element that a murder be committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity."

4. Whether the government sufficiently proved, and the jury was properly instructed regarding, petitioner Locascio's knowing and willful participation in the alleged conspiracies.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1400

JOHN GOTTI, PETITIONER

v.

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FRANK LOCASCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-56a)[1] is reported at 6 F.3d 924.

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[1] "Pet. App." refers to the petition appendix in No. 93-1400.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993. A petition for rehearing was denied on December 7, 1993. Pet. App. 59a-60a. The petitions for a writ of certiorari were filed on March 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of substantive and conspiracy violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. 1962(c) and (d)) (Counts 1 and 2). In addition, petitioners were convicted of conspiring to murder, and murdering, Louis DiBono (18 U.S.C. 1959(a)(1) and (5)) (Counts 7 and 8); of conspiring to murder Gaetano "Corky" Vastola (18 U.S.C. 1959(a)(5) (Count 9); of conspiring to obstruct grand jury investigations (18 U.S.C. 371) (Count 11); and of conspiring to defraud the United States in the ascertainment, computation and collection of income taxes (18 U.S.C. 371) (Count 13). Petitioner Gotti was also convicted of conspiring to murder, and murdering, Robert DiBernardo and Liborio "Louie" Milito (formerly 18 U.S.C. 1952B(a)(1) and (5) (Supp. IV 1986) (Counts 3-4 and 5-6); of conducting an illegal gambling business (18 U.S.C. 1955) (Count 10); and of obstructing justice (18 U.S.C. 1512) (Count 12).

The district court sentenced petitioners to life imprisonment on the RICO and certain murder counts, to run concurrently with lesser terms of imprisonment on the remaining counts. Each petitioner was also ordered to pay a total fine of $250,000, as well as $650 (Gotti) and $350 (Locascio) in special assessments. Pet. App. 6a. The court of appeals affirmed. *Id.* at 1a-56a.

1. Petitioner Gotti was the boss, and petitioner Locascio the acting underboss, of the Gambino Family of La Cosa Nostra. The trial evidence included tape recordings of petitioners' lawfully intercepted conversations at several locations, most significantly an apartment two stories above the Ravenite Social Club that served as the Gambino Family's headquarters. Petitioners' conversations in that apartment encompassed discussion of whom they had murdered and why; how to exert the Family's control over various New York City industries and unions; and how to obstruct law enforcement investigations of the Family. Salvatore Gravano, a Gambino Family "consigliere" who participated in many recorded conversations and was indicted with petitioners, also testified after entering a cooperation agreement with the government shortly before trial. The court of appeals described the tape-recorded conversations as "damaging for [petitioners]" and Gravano's testimony as "especially damaging." Pet. App. 4a-6a. See generally Gov't C.A. Br. 3-36 (detailed description of trial evidence).

2. The court of appeals affirmed petitioners' convictions.[2] Pet. App. 1a-56a.

a. The court of appeals held that the district court properly instructed the jury regarding RICO's "pattern" element. Pet. App. 36a-38a. It explained that RICO "requires that defendants commit at least two acts of racketeering that: (1) are related, and (2) amount

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[2] The court rejected several claims that petitioners do not renew in this Court. *E.g.*, Pet. App. 7a-19a (disqualification of defense attorneys who had served as "house counsel" and had first-hand knowledge of events presented at trial); *id.* at 19a-28a (expert testimony regarding the structure of organized crime families); *id.* at 45a-46a (sequestration of anonymous jury); *id.* at 47a-48a (severance of defendants and other challenges); *id.* at 48a-53a (denial of new trial motion).

to or pose a threat of continued criminal activity." *Id.* at 36a (citing *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989)). The court did not take issue with Gotti's assertion that some "other circuits require that the racketeering acts further the affairs of the enterprise, not just relate to the enterprise." Pet. App. 37a (citations omitted). Nonetheless, the court relied on Second Circuit precedent that "does not impose such an 'in the furtherance of' requirement" but instead allows "the relatedness requirement [to] be satisfied by proof that: (1) the defendant was enabled to commit the offense solely by virtue of his position in the enterprise; or (2) the offense was related to the activities of the enterprise." *Ibid.* (citations omitted). It concluded that the district court's instructions were correct because "under the law of this Circuit, it is not determinative that the defendant committed the crime to further his own agenda, if indeed he was only able to commit the crime by virtue of his position within the enterprise." *Ibid.*[3]

b. The court of appeals held that petitioners were not entitled to a new trial based on a remark in the prosecutor's closing argument. Pet. App. 43a-45a. That remark, which was promptly interrupted and stricken by the district court, advised the jury that: "If you accept the proof of what you are dealing with here, the boss of a murderous and treacherous crime family and his underboss, you

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[3] In a similar vein, the court rejected Gotti's argument that the district court erred by failing to instruct that "the predicate racketeering acts must be related both to each other and to the enterprise." Pet. App. 37a. It explained, to the contrary, that "the relatedness requirement is satisfied even if the predicate acts are not *directly* related to each other so long as both acts are related to the RICO enterprise in such a way that they become *indirectly* connected to each other." *Ibid.*

would be less than human, if you didn't feel some personal concern—" (*id.* at 43a-44a). The court of appeals condemned that remark as "totally inappropriate" (*id.* at 44a) and indeed "indefensible" (*id.* at 45a). Nonetheless, it concluded that reversal was not warranted:

> Although the statement potentially caused jurors to question their own safety, the fact that the district court immediately struck the remark mitigates the possible prejudice. The transcript shows that the prosecutor immediately moved on to other areas, and it is likely that the jury did not even take notice of the intent and meaning of the safety reference. Most importantly, in view of all the evidence in this case, the likelihood that the remark had anything to do with the convictions is nonexistent. As noted earlier, the jury did not robotically vote to convict [petitioners] on all charges, acquitting Locascio on one count. This indicates that the jury does not appear to have been influenced to deviate from its sworn duties. The conduct, therefore, was harmless.

Id. at 45a (citation omitted).

c. The court of appeals held that the district court had not committed plain error in instructing the jury on the murder and murder conspiracy counts under 18 U.S.C. 1959. Pet. App. 28a-35a. Section 1959 requires proof that the murder was committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." *Id.* at 28a-29a (quoting 18 U.S.C. 1959(a)). The court of appeals explained that "[t]he 'maintaining or increasing' requirement is given its ordinary meaning and is satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he

committed it in furtherance of that membership." Pet. App. 29a (internal quotations omitted).

Here, "the district court initially clearly instructed the jury that the government had to prove that [petitioners] committed the murders in order to maintain or increase their respective positions in the enterprise." Pet. App. 30a-31a (quoting instructions). The court of appeals explained, however, that toward the end of its instructions on the murder counts, and in instructing the jury on the murder conspiracy counts, the district court failed to "mention[] the maintaining-or-increasing-his-position motive and us[ed] instead the short-hand phrase 'in aid of racketeering.'" *Id.* at 31a; see also *id.* at 32a. While the court of appeals criticized such short-hand references (see *id.* at 31a, 33a, 35a), it explained that jury instructions must be viewed in complete context. *Id.* at 34a (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)). It held that "even with the lapses, the instruction as a whole accurately charged the jury, especially considering that the court did properly impart the motive requirement numerous times and did give the jury the indictment, which also used the 'increase or maintain' language." Pet. App. 34a.

In any event, the court concluded that, because petitioners failed to object to that aspect of the charge at trial, reversal would be warranted only if they established plain error resulting in a miscarriage of justice. Pet. App. 34a-35a (citing Fed. R. Crim. P. 52(b) and case law under that rule). The court of appeals explained: "In light of the facts (a) that at the outset of its § 1959 instructions the district court properly instructed the jury as to the need to find a position-related motive, (b) that the jury was given a copy of the indictment, which correctly stated the motive requirement, (c) that the court advised the jury that it must determine whether or

not the government had proven the conspiracy 'as it is alleged in the indictment,' and (d) that there was overwhelming evidence in the record to support a finding of such a motive, we cannot conclude that the court's shorthand summaries resulted in such a miscarriage of justice." Pet. App. 35a; see also *id.* at 54a-56a (separate opinion concurring that instructions were not plain error).

d. The court of appeals held that the government sufficiently proved, and the jury was properly instructed regarding, Locascio's participation in the conspiracies. Pet. App. 38a-43a. The court recognized that "conspiracy law has required more than 'mere presence' or mere knowledge * * * [; r]ather, it is necessary for the government to introduce some evidence of participation in the conspiracy in order to sustain a conviction." *Id.* at 39a-40a (citations omitted). It determined that "Locascio * * * was not convicted for his mere presence" (*id.* at 40a):

> [T]he evidence viewed in the light most favorable to the government indicates that, as the "underboss," Locascio was present to help evaluate plans presented to Gotti and give advice as needed. Gotti, Locascio, and Gravano took extensive but ultimately unsuccessful precautions to ensure that their conversations in the Ravenite Apartment, the conversations constituting the bulk of the evidence against them, were not overheard. Considering the precautions taken to ensure security, and after hearing the tapes of what was discussed in that apartment, the jury was entitled to consider whether it was likely that Locascio would have been present during those conversations if he were not a participant. Although Locascio's mere presence would not be sufficient to

> sustain his conviction, the government did far more than establish mere presence.

Id. at 41a-42a.

The court of appeals also upheld the jury instruction on that point. Pet. App. 42a-43a. Rejecting Locascio's argument that the instruction improperly allowed conviction based on mere presence, the court of appeals deemed it "clear that the district court quite properly instructed the jury that presence under circumstances that advance the purposes of the conspiracy would be sufficient to support a finding of guilt." *Id.* at 43a.

ARGUMENT

1. Petitioners argue that the RICO jury instructions were deficient because they permitted the jury to find that the predicate acts of racketeering were related to the enterprise even if they "were committed exclusively for an individual's own purpose and not to further the goals of the [RICO] enterprise." 93-1400 Pet. 5. That argument lacks merit.[4]

RICO's "pattern of racketeering activity" element "requires that defendants commit at least two acts of racketeering that: (1) are related, and (2) amount to or pose a threat of continued criminal activity." Pet. App. 36a (citing *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989)). The court of appeals correctly

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[4] Petitioners characterize their claim as requiring resolution of the phrase in RICO "to conduct or participate, directly or indirectly, in the conduct of the affairs of an enterprise." 93-1400 Pet. 5. In fact, as the court of appeals correctly recognized, petitioners attacked the portion of the jury instruction that defined the "pattern of racketeering activity" element of RICO. Pet. App. 36a-37a. In any event, the instructions, read as a whole, clearly presented the issue to the jury that petitioners claim was erroneously omitted.

held "the relatedness requirement * * * satisfied by proof that: (1) the defendant was enabled to commit the offense solely by virtue of his position in the enterprise; or (2) the offense was related to the activities of the enterprise." Pet. App. 37a (citations omitted).

In addition to the "pattern" element, however, the district court instructed the jury regarding the distinct requirement that petitioners be shown to have "conducted or participated" in the conduct of the affairs of the enterprise. Pet. C.A. App. 1085, 1087-1088.[5] As to that element, the district court explained: "The terms conduct and participate in the affairs of an enterprise include the performance of acts, functions, duties, that are either necessary or helpful to the operation of that enterprise." *Id.* at 1087-1088. That instruction closely tracks the pattern jury instruction that petitioners contend (93-1400 Pet. 5-6) should have been given. See E. Devitt, C. Blackmar, and K. O'Malley, *Federal Jury Practice and Instructions* § 48.08, at 724 (1990) ("The term 'to conduct or participate, directly or indirectly, in the conduct of' the affairs of the enterprise means the performance of acts, functions, or duties which are necessary or helpful in the operation of the enterprise.").[6]

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[5] The court instructed the jury that the government must prove five separate RICO elements beyond a reasonable doubt: (1) that an "enterprise" existed, (2) that petitioners were "associated with or employed by" the enterprise, (3) that petitioners "conducted or participated" in the conduct of the affairs of the enterprise, (4) that they did so through a "pattern of racketeering activity," and (5) that the conduct of the enterprise affected "interstate commerce." Pet. C.A. App. 1084-1085, 1093.

[6] In *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1173 (1993), this Court construed the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" to require

The court of appeals' decision does not conflict with *United States* v. *Erwin*, 793 F.2d 656 (5th Cir.), cert. denied, 479 U.S. 991 (1986), the case on which petitioners principally rely. The *Erwin* court explained that "[r]acketeering activity alone does not violate RICO" but "[r]ather, the activity must further the affairs of the enterprise." 793 F.2d at 671. As support, it cited Fifth Circuit case law "finding [an] insufficient nexus to 'participation' unless (1) defendant has in fact committed the alleged racketeering acts; (2) his position in the enterprise facilitated his commission of those acts; and (3) the predicate acts had some effect on the enterprise." *Ibid.* (citing *United States* v. *Cauble*, 706 F.2d 1322, 1333 (5th Cir. 1983)); see also Fifth Circuit Pattern Jury Instruction No. 2.72, at 178 (1990) (requiring same three elements). The court of appeals' conclusion that "it is not determin[a]tive that the defendant committed the crime to further his own agenda, if indeed he was only able to commit the crime by virtue of his position within the enterprise" (Pet. App. 37a) is fully consistent with the Fifth Circuit' formulation. Proof that a defendant committed racketeering acts, facilitated by his position in the enterprise, expressly satisfies the first two Fifth Circuit elements and implicitly the third element as well.[7]

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an element of managing or operating the enterprise. Petitioners, however, did not request an instruction along those lines at trial, did not raise such a claim on appeal, and do not make that claim in this Court. In any event, the proof at trial established that petitioners were "in command of an extensive criminal enterprise," Pet. App. 5a, and there was no plain error in the instructions that would justify further review.

[7] The *Erwin* court recognized as much when it stated:

> The contours of a conspiracy may wholly overlap those of the enterprise. In that case, the racketeering activity of a

Finally, the jury instructions in no way precluded petitioners' "defense[] that the government's key witness, the turncoat Gravano, committed the series of predicate acts and substantive offenses charged in the indictment for his own purpose and not in furtherance of the affairs of the enterprise" (93-1400 Pet. 5). On the contrary, the district court required "proof beyond a reasonable doubt * * * that *the defendant you are considering* conducted or participated directly or indirectly in the affairs of the enterprise * * * through a pattern of racketeering activity." Pet. C.A. App. 1087-1088 (emphasis added). The government thus was required to prove petitioners' own conduct or participation in the enterprise through a pattern of racketeering; if in fact the jury found that the only racketeering acts were committed solely by Gravano for

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co-conspirator may well be sufficiently connected to the enterprise to violate RICO.

793 F.2d at 671. The problem in *Erwin*, not present here, was that the individual who committed certain racketeering activity was "not a member" of the alleged enterprise so the jury could not automatically "infer[]" a nexus between his racketeering activity and the affairs of the enterprise. *Ibid.* & n.24. While the court of appeals did not take issue with Gotti's assertion that some "other circuits require that the racketeering acts further the affairs of the enterprise, not just relate to the enterprise," Pet. App. 37a, *Erwin* is clearly distinguishable. Thus, the "conflict" claimed by petitioners (93-1400 Pet. 5) is more semantic than real. Petitioners' reliance (*id.* at 6) on *Bank of America* v. *Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), and *United States* v. *Truglio*, 731 F.2d 1123, 1132 (4th Cir.), cert. denied, 469 U.S. 862 (1984), is similarly misplaced. *Bank of America*'s essential approach was rejected by this Court in *Reves*, 113 S. Ct. at 1169, 1173. *Truglio*'s holding turned on the government's failure to establish predicate acts of racketeering. 731 F.2d at 1132 (finding insufficient evidence of Travel Act violations by a courier for a prostitution ring).

his own purposes, it could not have convicted petitioners. As the court of appeals noted in discussing petitioners' convictions under 18 U.S.C. 1959, "[t]he jury was free to accept Gotti's defense that the murders had been planned and committed only to further Gravano's interests, and simply rejected that theory." Pet. App. 35a.[8] Thus, even assuming there is some meaningful difference between the formulations of the Second and Fifth Circuits regarding an "in furtherance" requirement, this case would not be an appropriate vehicle for resolving it.

2. Petitioners next challenge the court of appeals' holding that the prosecutor's closing argument—alluding to the possibility that jurors might have safety concerns—was harmless error. 93-1400 Pet. 7-9. The court succinctly and persuasively explained why that remark, though improper, did not require reversal of petitioners' convictions. See Pet. App. 45a. In addition, after striking the remark, the district court "direct[ed] the jury to disregard" it. Pet. C.A. App. 1000. Reversing petitioners' convictions would therefore require departure from "the almost invariable assumption of the law that the jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). In any event, the court of appeals' case-specific determination does not warrant further review. Cf. *United States* v. *Hasting*, 461 U.S. 499, 510 (1983) ("we are not required to review records to evaluate a harmless-error claim, and do so sparingly").

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[8] The murder of Louis DiBono exemplifies the overwhelming evidence that the racketeering acts were in furtherance of the enterprise. Although petitioners argued that the murder stemmed from Gravano's personal disputes with DiBono, Gotti was caught on tape telling Locascio: "You know why [DiBono's] dying? He's gonna die because he refused to come in when I called." Gov't C.A. Br. 21.

3. Petitioners also renew their challenge (93-1400 Pet. 9-12) to the district court's instructions regarding the statutory requirement, on the murder and murder conspiracy counts, that the murder have been committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity" (18 U.S.C. 1959(a)). The court of appeals explained that, while the district court initially instructed the jury completely on that requirement, its later instructions instead used "the short-hand phrase 'in aid of racketeering.'" Pet. App. 30a-31a. While the court of appeals criticized that short-hand (see *id.* at 31a, 33a, 35a), it found that the instructions were not plain error requiring reversal (*id.* at 35a).

The court of appeals properly applied a plain error standard of review applicable to claims not properly preserved in the district court. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 113 S. Ct. 1770, 1776-1779 (1993).[9] It thoroughly explained why petitioners could not satisfy the plain error standard on the facts of this case. See Pet. App. 35a. There is no basis for further review of that case-specific conclusion.

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[9] Petitioners take issue with any use of the plain error standard, and they rely on "a letter submitted to the district court * * * objecting to those portions of the court's charge which were 'different from or excludes or includes different language than the proposed requests to charge proffered by the [petitioners],' with specific reference to the § 1959 charges." 93-1400 Pet. 12 n.3. That generalized objection was not sufficient to preserve the specific challenge first raised on appeal. See Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly* the matter to which that party objects and the grounds of the objection.") (emphasis added).

4. Finally, petitioner Locascio challenges the sufficiency of the jury instructions and proof regarding his knowing and willful participation in the alleged conspiracies (93-1420 Pet. 10-23).

a. The instructions, which must be viewed in full context (*Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), thoroughly explained the need for proof beyond a reasonable doubt that Locascio knowingly and willfully participated in the alleged conspiracies. The district court instructed that the government must first prove that "[t]he conspiracy charged existed" (Pet. C.A. App. 1051), and that "[t]he second element which the Government must prove beyond a reasonable doubt is that the defendant knowingly and willfully became a member of the conspiracy" (*id.* at 1053). The court elaborated, as to that second element, that:

> Before you can find that a defendant was a member of the conspiracy, the evidence must show beyond a reasonable doubt the conspiracy was knowingly formed and that the defendant willfully participated in the unlawful plan, with the intent to advance [or] further some object or purpose of the conspiracy.
>
> I have already explained to you that an act is done "knowingly" if done voluntarily and intentionally, not because of some accident or mistake. I have already explained to you to act or participate "willfully" means to act voluntarily, intentionally, and with the specific intent to do something that the law forbids.
>
> * * * * *
>
> The mere fact that the defendant was present at meetings or was seen with one of the conspirators or

associated with him, was related to or had a friendship with one of them or worked with one of them, in and of itself is not enough to make a conspirator.

I want to caution you too, mere knowledge of or acquiescence without participation in the unlawful plan is not enough. What the law requires is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy, with the intent of aiding in the accomplishment of those unlawful objectives.

Before you can find the defendant was a member of the conspiracy, you would have to find that he intentionally, deliberately joined the conspiracy, participated in it, had a specific intent to do something that the law forbids.

Now, although mere presence or mere association with conspirators is not enough, it's a factor that you may consider among others to determine whether the defendant was a member of the conspiracy. The defendant's presence may establish his membership in a conspiracy, if all of the circumstances considered together show that his presence was meant to advance the goals of that conspiracy.

He must not only have been present, he must have known about the conspiracy, he must have intended by his presence to participate in the conspiracy or to help it succeed.

In other words, presence itself may demonstrate membership in a conspiracy only if that presence is a functional part of the conspiracy.

Id. at 1053-1055.

Locascio suggests that the phrasing of the final sentence could have obliterated the concededly "accepted definitions of conspiratorial liability" preceding it (93-1420 Pet. 10) and allowed the jury to convict "those who may serve a function in a conspiracy, although they have neither knowledge or an intent to further the scheme" (*id.* at 12). Locascio postulates that "the new 'functional presence' instruction would permit a jury to convict a watchman hired to guard a warehouse filled with contraband upon a finding that his presence was intended to and did further the plot involving the contraband, absent any finding that *the watchman* intended to participate and further the plot or even knew the contents of the warehouse" (*id.* at 12-13, emphasis in original). Those suggestions ignore the district court's repeated instructions requiring that "the defendant willfully participated in the unlawful plan, with the intent to advance [or] further[] some object or purpose of the conspiracy" (Pet. C.A. App. 1053), that "the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy, with the intent of aiding in the accomplishment of those unlawful objectives" (*id.* at 1054-1055), and that the defendant must have "intentionally, deliberately joined the conspiracy, participated in it, [and] had a specific intent to do something that the law forbids" (*id.* at 1055). There is no "reasonable likelihood that the jury understood the instructions" (*Victor* v. *Nebraska*, No. 92-8894 (Mar. 22, 1994), slip op. 3, citing *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 n.4 (1991)) to allow conviction without proof beyond a reasonable doubt that Locascio knowingly and willfully participated in the conspiracies.

Locascio further errs in describing as "unprecedented" (93-1420 Pet. 10) the instruction that "mere" presence is insufficient but that "presence itself may

demonstrate membership in a conspiracy only if that presence is a functional part of the conspiracy" (Pet. C.A. App. 1055). As Locascio notes, that formulation originated with Second Circuit cases explaining that "presence itself will support a conspiracy conviction only if that presence is a functional part of the conspiracy." *United States* v. *Soto*, 716 F.2d 989, 992 (1983). And, in rejecting Locascio's challenge to the instruction, the district court expressly relied on Seventh Circuit case law to the same effect. See Gov't C.A. Br. 110 & n.100. The same concept has been expressed in different terms by other federal courts of appeals. For example, one court recently explained:

> The defendant's presence at a place where contraband is found may or may not be purely coincidental. The attendant circumstances tell the tale—and the culpability of a defendant's presence hinges upon whether the circumstances fairly imply participatory involvement. In other words, a defendant's "mere presence" argument will fail in situations where the "mere" is lacking.

United States v. *Echeverri*, 982 F.2d 675, 678 (1st Cir. 1993) (holding that the jury rationally could have found that "this was a case of culpable presence as opposed to mere presence").[10]

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[10] See also *United States* v. *Montoya-Ortiz*, 7 F.3d 1171, 1177 (5th Cir. 1993) ("presence is a significant factor to be considered within the context of the circumstances under which it occurs") (internal quotations omitted); *United States* v. *Gutierrez*, 978 F.2d 1463, 1469 (7th Cir. 1992) ("presence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the ends of the conspiracy") (internal quotations omitted); *United States* v. *Andrews*, 953 F.2d 1312, 1318 (11th Cir. 1992) ("We will thus uphold a conviction when the cir-

Locascio errs in claiming (93-1420 Pet. 15-17) that the decision in this case conflicts with other decisions holding that "mere presence" is insufficient to support a conspiracy conviction. As we have explained, the district court repeatedly instructed the jury to that effect (Pet. C.A. App. 1053-1055). Likewise, the court of appeals recognized that "conspiracy law has required more than 'mere presence' or mere knowledge" and it determined that petitioner "was not convicted for his mere presence" (Pet. App. 39a-40a).[11]

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cumstances surrounding a person's presence at the scene of conspiratorial activity are so obvious that knowledge of its character can fairly be attributed to him.") (internal quotation marks omitted).

Contrary to Locascio's suggestion (93-1420 Pet. 11-12), there is no reason the jury may not be informed of the legal distinction between "mere" presence and presence intended to serve a function of the conspiracy. That distinction is commonplace. In *United States* v. *Cochran*, 955 F.2d 1116, 1123 (7th Cir. 1992), for example, the court upheld a jury instruction that: "Presence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the conspiracy." Noting its prior "state[ments] on numerous occasions that the challenged sentence is an accurate reflection of the law," the court of appeals concluded that "[n]o error resulted from adding the sentence to the pattern jury instruction." *Ibid.* (citing cases).

[11] Locascio claims that the decision below conflicts with the requirement that all elements of a crime be proved beyond a reasonable doubt. 93-1420 Pet. 18 (citing *Sullivan* v. *Louisiana*, 113 S. Ct. 2078 (1993)). That claim rests on a mischaracterization of the court of appeals' opinion. The court of appeals recognized at the outset of its evidentiary review that "we will affirm the conviction if any jury could have found guilt *beyond a reasonable doubt* based on the reasonably drawn inferences from that evidence." Pet. App. 39a (emphasis added). In subsequently discussing the evidence of Locascio's knowing participation in the conspiracy, the court noted that "the jury was entitled to consider whether it was

b. There was ample evidentiary support for the jury verdicts finding petitioner guilty of knowingly and willfully having participated in the alleged conspiracies. See Gov't C.A. Br. 3-36, 137-148 (discussing evidence on each count). A reviewing court must, of course, "view[] the evidence in the light most favorable to the prosecution" and ask only whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979).

Here, the court of appeals correctly concluded that "as the 'underboss,' Locascio was present to help evaluate plans presented to Gotti and give advice as needed." Pet. App. at 41a; see, *e.g.*, Gov't C.A. Br. 138-139 (citing transcript of Gotti's statement to Locascio: "Am I lying, am I out of order here? Correct me! You're my. . . 'Underboss.' Correct me Frankie."). The court of appeals also stressed Locascio's and the others' "extensive but ultimately unsuccessful precautions to ensure that their conversations in the Ravenite Apartment, the conversations constituting the bulk of the evidence against them, were not overheard." Pet. App. 41a-42a; see, *e.g.*, Gov't C.A. Br. 5 & n.5 (discussing how, after climbing

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likely that Locascio would have been present during those conversations if he were not a participant." *Id.* at 42a. Contrary to Locascio's claim, that comment cannot fairly be read as accepting a lowered "likelihood" burden of proof; instead, it simply describes an inference jurors could draw to determine whether the government proved its case beyond a reasonable doubt. Other courts have used similar language in upholding jury verdicts. See, *e.g.*, *United States* v. *Brigham*, 977 F.2d 317, 319 (7th Cir. 1992) (in discussing permissible jury "inferences" regarding defendant's mere presence argument, court of appeals rhetorically asked: "Is Amos likely to come alone? Is a companion apt to be ignorant of the nature and risks of the transaction?").

two flights of stairs from Ravenite Social Club to apartment, petitioners took additional steps to prevent eavesdropping, such as suggesting that conspirators check outside door and turn up radio). Where an "underboss" repeatedly is present during conspiratorial discussions, and takes extensive steps to prevent them from being overheard, a rational jury is entitled to infer that the underboss is a knowing and willful participant in the conspiracies.[12]

c. Finally, there is no merit to Locascio's claim (93-1420 Pet. 20-23) that, as applied to this case, the RICO statute is unconstitutionally vague. Locascio's organized crime activities are at the very core of RICO, and thus that statute can scarcely have failed to give Locascio fair notice that his conduct was proscribed. See, *e.g.*, *United States* v. *Pungitore*, 910 F.2d 1084, 1104 (3d Cir. 1990) (RICO not vague as applied to activities of La Cosa Nostra), cert. denied, 111 S. Ct. 2010 (1991); *United States* v. *Angiulo*, 897 F.2d 1169, 1179-1180 (1st Cir.) (same), cert. denied, 498 U.S. 845 (1990). Locascio's vagueness claim depends on the premise that the court of

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[12] Cf. *United States* v. *Martinez-Moncivais*, 14 F.3d 1030, 1035 (5th Cir. 1994) ("When, as here, the defendant's presence is more than isolated or random and is considered along with the other evidence presented, we cannot say that the jury was irrational in finding Martinez guilty of knowing, voluntary participation in the narcotics conspiracy alleged in this indictment."); *United States* v. *Carson*, 9 F.3d 576, 587 (7th Cir. 1993) ("We recently held that the government can sustain a drug conspiracy conviction solely on evidence that the defendant engaged in counter-surveillance during a drug transaction. Such a holding does not obliterate the 'mere presence' rule, for we have long recognized that while presence alone is not enough to convict, [p]resence or a single act will suffice . . . if the circumstances permit the inference that the presence or act was intended to advance the ends of the conspiracy.") (citation omitted; internal quotation marks omitted).

appeals "rel[ied] simply upon evidence that proves only that [he] is a member of the charged enterprise, [without] additional proof he intended to commit the specific offenses alleged" (93-1420 Pet. 21). Because that premise fails, so too must Locascio's vagueness claim.

Locascio adds a footnoted argument (93-1420 Pet. 19 n.9) that the "broad theory of vicarious liability" was "particularly prejudicial" because of a "separate instructional error," namely the district court's failure to instruct the jury that evidence of Gravano's other bad acts was admitted solely as impeachment. The government's court of appeals brief thoroughly rebutted this argument (Gov't C.A. Br. 61-64) and it was one of the arguments summarily rejected by the court of appeals as "without merit and unworthy of further discussion" (Pet. App. 48a). Locascio has not properly raised that issue in this Court because it is not listed among his "questions presented for review" nor is it "fairly included" within any of the properly presented questions. See Sup. Ct. R. 14.1(a); *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-1420

In the Supreme Court

OF THE

United States

OCTOBER TERM 1993

FRANK LOCASCIO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

REPLY TO THE UNITED STATES' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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I.

THE SECOND CIRCUIT'S RATIFICATION OF THE "FUNCTIONAL PRESENCE" INSTRUCTION REQUIRES REVIEW BY THIS COURT

The government attempts in its opposition to demonstrate to this Court that the theory and instructions upon which Frank LoCascio was convicted of the most grave criminal offenses were "commonplace." (Opposition at 18 n.10). To the contrary, the very authority marshalled by the government demonstrates that the theory of conspiratorial liability on which LoCascio was convicted is unprecedented and extraordinary.

The prosecutor told the district court below that:

> It is our position legally that Frank Locascio's presence served the purpose and that *he need not utter one word at all to be part of the conspiracy to kill Corky Vastola.*

(RT 6910) (emphasis added). He argued to the jury that, in a case bereft of evidence that LoCascio either perpetrated any charged offense or urged another to do so, Locascio's

presence in the apartment above the Ravenite rendered him guilty of crimes as varied as murder, loansharking, and gambling "*wholly apart from what he says or does.*" (RT 7825) (emphasis added).

The jury was then instructed:

> The defendant's presence may establish his membership in a conspiracy, if all the circumstances considered together show that his presence was meant to advance the goals of the conspiracy.
>
> * * *
>
> In other words, *presence itself may demonstrate membership in a conspiracy only if that presence is a functional part of the conspiracy.*

(RT 8058-8059) (emphasis added).

The Second Circuit's approval of the government's theory and the district court's instructions constitutes a clear break with the jurisprudence collected by the Solicitor General. *LoCascio* simply goes farther, and the additional step it takes is one against which this Court has cautioned.

The cases relied upon by the Solicitor General support an unobjectionable proposition: a defendant' presence at the scene of a crime is a factor which, when combined with attendant circumstances making obvious his intent to participate in that crime, is sufficient to support a conviction for conspiracy or the target offense. *See United States v. Montoya-Ortiz*, 7 F.3d 1171, 1177 (5th Cir. 1993) ("presence is a significant factor to be considered within the context of the circumstances under which it occurs"); *United States v. Echeverri*, 982 F.2d 675, 678 (1st Cir. 1993) (presence in apartment sufficient to support conviction when attendant circumstances clearly indicate defendant was in knowing possession of contraband); *United States v. Andrews*, 953

F.2d 1312, 1318 (11th Cir. 1992) (circumstances surrounding defendant's presence at scene of conspiracy clearly suggest knowledge of its character and intent to participate in it).

United States v. Cochran, 955 F.2d 1116, 1123 (7th Cir. 1992), the case cited by respondent[1] which involves the instruction closest to the one at issue here, in fact buttresses petitioner's call for review by this Court of this important area of instructional jurisprudence. In *Cochran*, the Seventh Circuit ratified the following instruction:

> Mere presence at the scene of the crime or mere association with the conspirators will not themselves support a conviction. *Presence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the conspiracy.*

Id. at 1123 (emphasis in original).

It is certainly true that a defendant's presence *intended by that same defendant* to advance the object of a conspiracy is sufficient to support a conspiracy conviction. Both the *Cochran* and *LoCascio* instructions cited above, however, fail to require any design by a defendant at all; they simply require that presence *be intended by someone* to foster the scheme. So long as the scheme's leader, for instance, intends an unknowing watchman or deliveryman's presence to "advance the conspiracy," the guard or deliveryman could be convicted under the cited portions of the *Cochran* and *LoCascio* charges without a jury finding those defendants possessed the specific intent required to commit the crime of conspiracy.

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[1]The government also cites *United States v. Gutierrez*, 978 F.2d 1463, 1469 (7th Cir. 1992). That case expressly relies on the *Cochran* court's ratification of the "intent to advance" instruction.

LoCascio then surpasses *Cochran* in eroding the rule that "presence" without further proof of a specific intent to commit the target offense of a charged conspiracy cannot support conviction of that conspiracy. The "functional part" language of the *LoCascio* charge vitiates the requirement that a defendant's presence at least be intended by *someone* to "advance" the scheme. That subjective element is supplanted by a standard for conviction that a defendant's presence be proven to have advanced a conspiracy by serving a "function," a term itself left undefined. This is a remarkable theory of liability for a crime that is at its essence one of joint intent, for the "functional part" definition contains no mental state element. Not surprisingly, the government has been unable to locate any other case in which use of the "functional part" language in a jury instruction was approved on appeal.

It was the "functional part" language that permitted and supported the government's argument to the jury that petitioner could be found guilty of any and all crimes discussed in his presence "*wholly apart from what he [LoCascio] says or does.*" The notion that a party present at a conversation, be it public or clandestine, is responsible for anything there discussed by others, irrespective of that party's own words or deeds, is chilling. Granted, the government stresses that the conversations here took place at the Ravenite Social Club. But our government has never been granted the power to convict the inhabitants of that address or any other of the most serious criminal offenses wholly apart from what they say or do, and for good reason. It is, quite simply, a power inherently incapable of application to the guilty alone.

The government argues vigorously that the district court gave other correct instructions on the intent required to convict of conspiracy. That is true. But the government ignores the fact that the last definition of conspiratorial liability given to the jury was the "functional part" language.

Most importantly, by its use of the preface "in other words," the district court informed the jury that the "functional part" language was an alternative explanation, of equal importance to the preceding instructions, as to how presence could serve as the basis for a conspiracy conviction. Thus, the district court gave the jury both correct and incorrect definitions of conspiratorial liability.

In a long line of cases dating to *Stromberg v. California*, 283 U.S. 359, 367-368 (1931), this Court has held that when a general verdict might have been based on a defective theory, the conviction must be reversed. *See Bachellar v. Maryland*, 397 U.S. 564, 571 (1970); *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *see also Yates v. Evatt*, 500 U.S., 114 L.Ed.2d 432 (1991)(mandatory presumption); *Boyd v. California*, 494 U.S. 370, 377-381 (1990); *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). That is certainly the appropriate remedy here, where petitioner neither committed the charged offenses nor expressed any intention to do so.

II.

THE SECOND CIRCUIT'S FAILURE TO REQUIRE EVIDENCE OF LOCASCIO'S INTENT TO COMMIT THE TARGET OFFENSES OF THE CHARGED CONSPIRACIES SETS ITS DECISION ON CONSPIRATORIAL LIABILITY IN CONFLICT WITH SETTLED LAW OF THIS COURT AND OTHER CIRCUITS

The government suggests that there was "ample evidentiary support for the jury verdicts finding petitioner guilty of knowingly and willfully having participated in the alleged conspiracies." (Opposition at 19). As petitioner has noted, however, the Second Circuit affirmed his convictions for murder, conspiracy to murder, and other grave crimes, exclusively on the basis of LoCascio's status as an advisor to

the alleged enterprise and presence during secured conversations at which illegality was discussed. Neither the Circuit opinion nor the government's opposition provides a single statement by petitioner of his intention to commit a crime; nor evidence of his prior awareness that the charged offenses would be discussed in his presence; nor any expression of assent to the commission of those offenses.

The government's opposition makes assertions such as "[p]etitioners' conversations in that apartment [the Ravenite] encompassed discussion of whom they had murdered and why" (Opposition at 3), but this is a mere rhetorical device. LoCascio never said anything about whom he had murdered and why. The best evidence of that fact is the government's failure to cite *any* statement of LoCascio in its opposition.

The Second Circuit's failure to require proof of petitioner's intent to commit the specific crimes charged as conspiratorial objects is novel and dangerous. Again, the cases cited by the government are instructive. In *United States v. Carson*, 9 F.3d 576 (7th Cir. 1993), the court rejected defendant's argument that while the government had demonstrated the existence of a conspiracy, it had failed to prove his part in the scheme. Relying on the *Cochran* language ("presence . . . intended to advance the ends of the conspiracy"), the court noted that "substantial evidence demonstrates that [the defendant] engaged in counter-surveillance for the purpose of protecting both [other defendants] and their investment in the five kilogram cocaine transaction." *Id.* at 588.

The defendant's actions during the commission of the charged offense in *Carson* reflect a specific and deliberate purpose to make the specific charged scheme succeed. *See also United States v. Martinez-Moncivais*, 14 F.3d 1030, 1035 (5th Cir. 1994) (overwhelming evidence to support jury verdict that defendant was aware that he was transport-

ing and delivering narcotics). Petitioner LoCascio was not present at the scene of the commission of any substantive offense. The *LoCascio* panel affirmed petitioner's wide-ranging convictions without evidence that he intended any target offense be committed. It is that lack of evidence of intent to agree which sets *LoCascio* in conflict with decisions of this Court and other circuits. *See* Petition at 13-18. And it is that conflict which necessitates this Court's examination.

CONCLUSION

For the reasons stated, this Court should grant the petition for certiorari to consider the important questions presented.

Dated: April 22, 1994

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